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December, 1868.

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OF

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CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXI VICTORIA.

JONES *v.* MACKIE.

1867
Nov. 2.

Defamation—Plea of apology and payment into court—Admission—Damages, assessment of, the plea not being proved—6 & 7 *Vict. c.* 96, *s.* 2.

To an action for a libel in a newspaper the defendant pleaded a plea, under the 6 & 7 Vict. c. 96, s. 2, alleging that he inserted a full apology, &c.; and he paid 5*l.* into court. The jury, having found the apology not sufficient and the plea therefore not proved, were directed by the judge to assess the damages irrespective of the 5*l.* paid into court, and without considering that payment in any way as an admission of liability:—

Held, a proper direction.

Declaration on a libel published by the defendant, of and concerning the plaintiff, in the *Altrincham and Bowdon Guardian.*

Plea, that the alleged libel was contained in a public weekly newspaper called the *Altrincham and Bowdon Guardian*, and was inserted in such newspaper without actual malice, and without gross negligence, and before action the defendant inserted in such newspaper a full apology for the said libel, and the defendant brings into court the sum of 5*l.* by way of amends, and says that the said sum is enough to satisfy the claim of the plaintiff in respect thereof. (1)

Replication, admitting the payment of the 5*l.* into court, and joining issue on the rest of the plea.

The cause was tried before Bovill, C.J., at the Manchester summer assizes, 1867, when the jury found that no sufficient apology had been made, and that the plea therefore was not proved. The learned judge, in summing up, directed the jury to assess the damages without reference to the amount paid into court, and not to consider the payment of the 5*l.* in any way in the light of an admission by the defendant of liability to that amount. The jury found a verdict for the plaintiff with damages 20*s.*

Quain, Q.C., for the plaintiff, moved for a new trial on the ground of misdirection. The judge should have told the jury to find a verdict for damages to the extent at least of 5*l.* The defendant by paying that sum into court under the 6 & 7 Vict. c. 96, s. 2, so far admitted his liability. The payment is none the less an admission, though the plea was not proved *in toto*. The statute (6 & 7 Vict. c. 96, s. 2) provides that a payment into court in libel is to be of "the same effect, and be available in the same manner, and to the same extent" as such a payment would be in any action where it may lawfully be made. But the only issue on an ordinary plea of payment into court is of "damages ultra." The jury have to say whether the amount paid in is enough or not. They cannot say that it is more than enough.

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(1) The 6 & 7 Vict. c. 96, s. 2, enacts, that in an action for libel contained in any public newspaper, it shall be competent to the defendant to plead that such libel was inserted in such newspaper without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper a full apology for the said libel, and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from personal actions, in which it is lawful to pay money into court under the 3 & 4 Will. 4, c. 42.

[CHANNELL, B. This plea not being proved, no liability is admitted. The defendant in effect says, "I published this libel without malice, or negligence, and if you will accept my apology I will give you 5*l*." But he does not bind himself to give anything if his terms are not accepted. His admission of liability is conditional and not absolute. (See per Pollock, C.B., in *Lafone* v. *Smith*, 4 H. & N., at p. 159.)]

The language of the statute will hardly bear that construction. The effect of holding the direction in this case to be correct will be that the plaintiff will get less damages without an apology than he would have received with an apology.

[In answer to the Court it was stated that the money still remained in court.]

KELLY, C.B. I am of opinion that the learned judge directed the jury rightly; we are not called on to say what is to be done with the money which has been paid into court. Whether the plaintiff or defendant is entitled to it, is immaterial to this application. The jury were properly told to assess the damages irrespective of the amount paid into court. The rule must, therefore, be refused.

BRAMWELL, CHANNELL and PIGOTT, BB., concurred.

Rule refused.

Attorney for plaintiff: *W. A. Holcombe.*

1867
Nov. 14.

7CLP628
631

Re ROBINSON.

Attorney and Client—Taxation—6 & 7 Vict. c. 73, *s.* 37.

The "special circumstances" required by 6 & 7 Vict. c. 73, s. 37, to entitle a client to have his attorney's bill referred to taxation, after the expiration of twelve months from its delivery, may be matters appearing on the face of the bill, such as large and unusual charges requiring explanation.

Field, Q.C. (*Sheppard* with him), moved to set aside an order by Martin, B., referring an attorney's bill to taxation. The bill had been delivered more than a twelvemonth; and it was contended, on the authority of *Re Whicher* (1), that the bill could now only be referred under 6 & 7 Vict. c. 73, s. 37 (2), on the ground of new matter come to the knowledge of the party, not on matters appearing on the face of the bill; that no such circumstances were shewn here, but the only ground of application was certain alleged overcharges.

The bill of costs related to the conduct of a country action tried in London, and the country attorney had, amongst other things, charged a sum of 92*l.* for thirty-one days' attendance in town.

The Court (Kelly, C.B., Martin, Bramwell, and Pigott, BB.) were of opinion, that the "special circumstances" required by s. 37, might be matters of objection appearing on the face of the bill, and that an unusual charge of a large amount requiring explanation to justify it, was sufficient ground for referring the bill to taxation, even after the expiration of the twelve months.

Rule refused.

Attorney for applicant: *H. T. Nabers, for Robinson, Settle.*

(1) 13 M. & W. 549.

(2) 6 & 7 Vict. c. 73, s. 37, giving power to the client within one month from the delivery of the bill of costs, and to the attorney *or* the client after the expiration of the month, to have the bill referred to taxation, provides that "no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill, after a verdict shall have been obtained" (*Re Whicher*), . . . "or after the expiration of twelve months after such bill shall have been delivered, . . . except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for such reference shall be made."

WILLIAMS AND ANOTHER *v.* ROSE.

1867
Nov. 15

Sheriff—Arrest—Protection—Deed under Bankruptcy Act, 1861 (24 & 25 *Vict.* c. 134), *s.* 198—*Certificate of Registration.*

Post 179, 180
3 Q.B. 626, -8
5 Q.B. 418, -9, 423,
6 Q.B. 52,

A certificate of the registration of a deed under the Bankruptcy Act, 1861, does not, by virtue of s. 198, protect the debtor from arrest for debts not bound by the deed, nor the sheriff in releasing him, at least without due inquiry.

To an action for an escape, the defendant pleaded that the debtor produced a certificate of the registration of a deed, within s. 198 of the Bankruptcy Act, 1861. Replication, that the judgment was subsequent to the registration, of which fact the defendant had notice, and which was stated on the writ of ca. sa.; that it was obtained on a debt which became due subsequently to the registration; and that the plaintiffs were not creditors under the deed in respect of the debt, as the defendant might with due care have known:—

Held, on demurrer, a good replication.

ACTION against a sheriff for an escape.

Plea, that the debtor being apprehended, produced to the officer, and gave him a copy of (1), a certificate of the registration of a deed between the debtor, his creditors, and trustees, within s. 198 of the Bankruptcy Act, 1861, wherefore the defendant released him.

Replication, that the deed was registered on the 23rd of October, 1866, and that it was so stated in the certificate, which was dated the 24th of October, 1866; that the judgment was obtained on the 30th of March, 1867, and that it was so stated in the writ of ca. sa.; that the defendant had notice that the judgment was obtained after the registration and certificate; that the judgment was obtained for a debt which became due after the registration and certificate, and that the plaintiffs were not, nor was any of them, a creditor or creditors of the debtor in respect of the said debt at the time of the making or registration of the deed; that the defendant did not take due care to ascertain whether the plaintiffs were, at the time of the making and registration of the deed, creditors of the debtor in respect of the debt, and that, by taking due care, he might and would have ascertained that the plaintiffs were not such creditors.

Demurrer and joinder.

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(1) See *Lees* v. *Newton*, Law Rep. 1 C. P. 658.

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WILLIAMS v. ROSE.

Raymond, in support of the demurrer. The legislature have, by s. 198 of 24 & 25 Vict. c. 134, made a certificate of registration equivalent to an order of protection, and the effect of that is strictly determined by 12 & 13 Vict. c. 106, s. 113. Immediately on producing it the debtor is to be discharged, and the officer is to detain him no longer than is necessary to obtain a copy, under a penalty of 5*l.* for every day of detention. No discretion is given to him to determine whether the debtor is really entitled to the protection of the certificate; he is bound to obey it, and its genuineness and the identity of the debtor are the only matters which he takes at his peril. *Lloyd* v. *Harrison* (1) is in point, to shew that the sheriff will be protected in discharging the debtor, when, if the debtor had been detained, and had himself applied to the Court for his discharge, his application would, on the ground of the invalidity of the deed, have been refused. (2) The reasoning in that case is applicable here, for the sheriff is as unable to know whether the debt is bound by the deed, as whether the deed is a valid one. Though the judgment may have been obtained, or even the debt have accrued due, after the deed, the debt may have been contracted before, and may be bound by the deed. On the other hand, though contracted before, it may be unaffected by it. (3) These are matters into which he cannot be put to inquire. The decision of *Wallinger* v. *Gurney* (4) upon the effect of a protection order under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 6, decides this case in favour of the defendant; and cases shewing that the debtor has no right to claim his discharge, have no application to the question whether the sheriff will not be protected in obedience to the command which the statute lays upon him, notwithstanding the debtor's abuse of his privilege.

H. James (*Crompton Hutton* with him, contrà). It is impossible that the construction contended for by the other side can be correct, for it would confer on the debtor perpetual immunity, at the discretion of a complacent sheriff. Where, however, the sheriff may keep

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12 Jur NS 701

(1) Law Rep. 1 Q.B. 502.

(2) See *Leigh* v. *Pendlebury*, 15 C. B. (N.S.) 815; 33 L. J. (C. P.) 172. (1)

(3) See *Sharland* v. *Spence*, Law Rep. 2 C. P. 456; *Robertson* v. *Goss*, Law Rep. 2 Ex. 396. *Ex parte Wilmot*, Law Rep. 2 Ch. 795.

(4) 11 C. B. (N.S.) 182; 31 L. J. (C.P.) 55. 8 Jur NS 513,

(1) 10 Jur NS. 296.

the debtor, he also must keep him; and the cases of *Grace* v. *Bishop* (1), and *Phillips* v. *Poland* (2), shew conclusively that a protection order under 12 & 13 Vict. c. 106, s. 112, avails only against creditors who could have proved under the bankruptcy. The law must be the same where the protection is derived from the registration of a deed; the sheriff discharges the debtor at his peril, and the hardship is not greater on him than in many cases of daily occurrence. Here, however, it is alleged that the defendant had actual notice, so that the discharge is wilfully wrong.

Raymond, in reply.

KELLY, C.B. The single question in this case is, whether a certificate of registration is a protection against an arrest for a debt contracted after the deed? If it were, the consequence would be that the debtor might go on indefinitely contracting new debts, against arrest for which he would be for ever protected by virtue of a deed which discharged him only from debts already existing. The pleadings shew that the judgment was recovered and the debt became due after the date of the deed, and that the sheriff had notice of the fact. It is impossible, therefore, that the certificate of registration could be any protection; the sheriff would, therefore, have been justified in detaining him and, having failed in his duty to do so, has no answer to the plaintiffs' complaint.

BRAMWELL, B. I am of the same opinion. It is extremely difficult to put a sensible meaning on the words of the 24 & 25 Vict. c. 134, s. 198. Protection in bankruptcy is an interim protection, but the certificate of registration is merely the record of a past act, viz., that a deed has been filed and registered, and no limit of time is fixed for its duration. We must, however, put some meaning on the provision; it must be an impediment to some proceedings; but not without limit, or a debtor might at any time after the registration of the deed, continue to flourish his certificate in the face of every creditor, not only those whose claims were bound by the deed, but creditors in respect of debts con-

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(1) 11 Ex. 424; 25 L. J. (Ex.) 58.

(2) Law Rep. 1 C.P. 204; acc. *In re Poland*, Law Rep. 1 Ch. 356. 12 Jur NS 425
12 Jur NS 260

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tracted, it may be, fifteen or twenty years afterwards. Whatever may have been meant by the act, we may safely say this cannot have been meant. Now, the act says that the certificate of registration is to have the same effect as a protection in bankruptcy, and the authorities cited, *Phillips* v. *Poland* (1) especially, are plain to shew that a protection order is available only against creditors who were such at the date of the bankruptcy, and that the debtor has no right to be discharged from custody except when the arrest is at their suit. The question then remains, whether, though the debtor is not entitled to his discharge, the sheriff can allow him to go without being guilty of an escape. I think he cannot. There is no greater hardship on the sheriff than in many other cases where he must act at his peril. At any rate he had notice of the judgment being after the deed, and even if that was not sufficient evidence that the debt was not bound by it, as, perhaps, it might not be, there is the further averment in the replication, that the debt in fact only became due after the deed, that the plaintiffs were not creditors under the deed, and that the defendant might, with reasonable care, have known it.

CHANNELL, B. Both upon the authorities cited, and independently of them, I concur.

PIGOTT, B., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *T. White & Sons.*
Attorneys for defendant: *Ware & Westall.*

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(1) Law Rep. 1 C. P. 204, 12 Jur NS 260

MARTIN *v.* THE GREAT INDIAN PENINSULAR RAILWAY COMPANY.

1867
Nov. 18.

Carriers—Negligence—Pleading—Contract, construction of.

The defendants, carriers in India, received the plaintiff's goods under a contract, by which the baggage of certain troops (including the plaintiff's goods) was to remain in charge of a guard provided by the troops, "the company accepting no responsibility:"—

Held, that the stipulation did not exempt the defendants from liability for a loss arising wholly from their own negligence.

The plaintiff and his goods were carried by the defendants under a contract with the Indian Government, and whilst being so carried his goods were destroyed by the defendants' negligence:—

Held, that, although the plaintiff could not sue the defendants for non-performance of their duty as carriers, he was entitled to sue for an injury done to his property through their negligence, whilst the goods were in their custody.

3 C.P. 14
9 C.P. 328
4 C.P.D. 272
325
5 C.P.D. 15

Declaration. First count, that the defendants were carriers of passengers and their luggage, on a railway from Budnairah to Bombay, for reward; that the plaintiff was received by them as a passenger, with his luggage, to be by them, as such carriers, safely and securely carried on the railway from Budnairah to Bombay, by a certain train, and the luggage to be delivered by them to him at Bombay on his arrival there by the said train, for reward; that a reasonable time for carrying and delivering the luggage elapsed, yet the defendants did not safely and securely carry the luggage and deliver it to the plaintiff, whereby, &c.

Second count, that the defendants were carriers, &c.; that the plaintiff was an officer in Her Majesty's service, and on duty with other officers and soldiers in Her Majesty's service, and that he was received by the defendants as a passenger, with his luggage, as and being an officer in Her Majesty's service, and on duty as aforesaid, to be by the defendants safely and securely carried, &c.; yet the defendants did not safely and securely carry the plaintiff and his luggage upon the railway on the said journey; and did not, while the plaintiff was such passenger with his luggage, use due and proper care in the carrying the plaintiff and his luggage, and in managing the railway and train on which the plaintiff was a passenger, with his luggage, but conducted themselves with such gross negligence, carelessness and want of skill, that the plaintiff's luggage was thereby set on fire and burnt, &c.

Fourth plea, to the first count, that the plaintiff and his luggage were received by the defendants to be carried, and at the time, &c. were being carried, under certain contracts between the defendants and Her Majesty's Indian Government, by which it was provided, with respect to the baggage of troops received by the defendants to be carried, and which should be carried under certain circumstances and conditions, that the defendants should be under no responsibility; that the luggage in the declaration mentioned was baggage within the meaning of the contracts; and that while it was being carried under the circumstances and conditions so mentioned, it was lost and destroyed, which are the grievances complained of.

Seventh plea, to the second count, repeating the fourth plea.

Replication to the fourth plea, that the contracts in the plea mentioned were in writing, and that the provision with respect to the baggage of troops in the plea mentioned was in the following terms:—"If the number of troops is sufficiently large a special train will be provided, and due notice, of at least six hours, shall be given to the railway authorities of the train being required. For the baggage of all detachments above forty the company shall provide the number of suitable goods wagons stated in the requisition, for which they shall be paid at the rate of 1½ annas per wagon per mile. The baggage shall remain in charge of a guard provided by the troops, *the company accepting no responsibility*;" that the defendants did not use due and proper care and diligence in and about the carrying of the plaintiff and his luggage, but on the contrary, were guilty of gross negligence, wilful default, &c., in respect thereof; and that by and through the said gross negligence, &c., of the defendants, the said luggage of the plaintiff was burnt and destroyed, which is the loss and destruction in the first count and the plea mentioned; and that the loss and destruction was wholly caused by the defendants' gross negligence, &c.

The same replication was further pleaded to the seventh plea.

Demurrer to the replication to the fourth and seventh pleas, and joinder.

Tenth plea, to the first count, that the plaintiff was a passenger on the defendants' line, as and being such officer on duty as in the second count mentioned; and the luggage was carried under a contract for the conveyance of the officers and soldiers then on duty, made between the defendants and Her Majesty's Indian Government, for the conveyance of troops, with their baggage, from Budnairah to Bombay, of which officers the plaintiff was one, and of which baggage the plaintiff's luggage formed part; and that the plaintiff was a passenger, and his luggage was carried under the said contract, and under no other contract; and that there never was any contract between the plaintiff and the defendants; nor did the plaintiff ever pay, or agree to pay, any reward to the defendants for such conveyance.

Eleventh plea, to the second count, repeating the tenth plea.

Demurrer to the tenth and eleventh pleas, and joinder.

Keane, Q.C. (*L. Smith* with him), in support of the replication, and of the demurrers to the tenth and eleventh pleas. First, the limitation of responsibility contained in the written contract applies only to losses which might have been prevented by the guard, not to such as are caused exclusively by the defendants' misconduct. This was the construction constantly put on such stipulations at common law, and independently of the Carriers' Act; see *Hinton* v. *Dibbin* (1); and it is in accordance with this view that in *Peek* v. *North Staffordshire Railway Company* (2), under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 7), a condition excluding liability for negligence was held illegal. That it is the true construction is obvious from the consideration, that the carriers would otherwise be exempted from all liability, whatever wrong they were guilty of.

[BRAMWELL, B. The defendants must contend that if they killed the guard by their negligence, and then injured the goods, they would still be exempt from liability. On the other hand, if the fire mentioned in the declaration were caused by a spark which the guard could and ought to have extinguished, the replication would not be proved.]

It must be admitted that the tenth plea is good, but the similar denial of any contract with the plaintiff in the eleventh plea is no answer to the second count of the declaration, which charges a

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(1) 2 Q. B. 646, at p. 659.

(2) 10 H. L. C. 473; 32 L. J. (Q. B.) 241.

9 Jn 45915.

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wrong independent of contract. The cases of *Marshall* v. *York, Newcastle and Berwick Railway Company* (1), and *Austin* v. *Great Western Railway Company* (2) are directly in point.

F. M. White, contrà. *Austin* v. *Manchester, Sheffield and Lincolnshire Railway Company* (3) shews that, independently of the Railway and Canal Traffic Act, the parties may make any stipulation they please, excluding even liability for negligence; and *Wilton* v. *Royal Atlantic Mail Steam Navigation Company* (4), on the whole, supports this view. Here the contract will be less strictly construed against the carriers than in the old cases relied on for the plaintiff, since the rule making carriers insurers exists by the custom of the realm only, and does not extend to India.

[CHANNELL, B. That question was discussed but not decided in *Bennett* v. *Peninsular and Oriental Steamboat Company.* (5)]

The nature of the contract, as disclosed by the replication, shews that the immunity of the defendants was intended on both sides to be very wide.

With respect to the eleventh plea, the cases cited are not conclusive. *Marshall* v. *York, Newcastle and Berwick Railway Company* (1) was based upon the custom of the realm. See the judgments, especially that of Williams, J. (6); and it may also be supported on the ground that the master was the servant's agent to pay. *Powell* v. *Layton* (7) shews that the duty of a carrier is founded on contract; hence, without contract, there is no liability, and this applies to both counts of the declaration.

Keane, Q.C., in reply.

KELLY, C.B. (after stating the declaration, the fourth plea, and the replication to it, proceeded.) It is contended by the defendants that, though it must on demurrer be taken that the luggage was destroyed by their own gross negligence and wilful default, yet under the proviso set out in the replication, they are protected from liability; but we are all of opinion that, though this limitation of responsibility would cover any loss of the baggage in the custody of the guard, occurring through the want of due care on the part of the officer in charge, or those under him, yet it is not applicable to luggage lost through the mere negligence of the company. The pleadings suggest a destruction by fire through the defendants' negligence. It is clear that the plaintiff could not have secured himself against a loss so caused by placing his luggage under the officer, whose duty it was only to take care in those matters in which he was competent to exercise care; but destruction by fire was a peril which, it may well be, could not have been averted by any care on his part, and to which, it is in substance alleged, no want of care on his part has contributed. The defendants are, therefore, liable for this loss, and judgment must be against them on the demurrer to this replication.

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(1) 11 C.B. 655; 21 L. J. (C.P.) 34.

(2) Law Rep. 2 Q. B. 442.

(3) 10 C. B. 454; 21 L. J. (C. P.) 179.

(4) 10 C. B. (N.S.) 453; 30 L. J. (C. P.) 369. 8 Jur N.S. 232

(5) 6 C. B. 775; 18 L. J. (C.P.) 85.

(6) 11 C. B. at p. 664.

(7) 2 B. & P. (N.R.) 365, at p. 370.

The tenth and eleventh pleas, which are severally pleaded to the first and second counts of the declaration, aver in substance that it was not by virtue of any contract with the plaintiff that his luggage was received and carried by the defendants, but that it was so received and carried under a contract with the government for the conveyance of the baggage of officers and soldiers on duty. As to the first count which sounds in contract, and in substance though not in form charges a violation of a contractual obligation, the plea is a sufficient defence; for, if the contract was not with the plaintiff, but with other persons,—and the only charge is one of non-performance of the obligation created by it,—no action can be maintained except by the person with whom the contract was entered into. As to the second count, which charges the defendants with negligence, and by which it appears that the plaintiff's luggage was lawfully on the defendants' railway, and, being properly there, was lost by their neglect, I should have been disposed to think that the neglect and breach of duty charged constituted only a breach of a duty constituted by contract, and that the contract being made with persons other than the plaintiff, this plea was liable to the same objection as the last. But my learned brothers take a different view, and think that the second count charges a wrong done, by which the plaintiff is affected in his property, and for which, therefore, independently of contract, he has a right to obtain redress. I do not wish to dissent from this view; and our judgment will, therefore, be for the plaintiff, on the demurrer to this plea.

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BRAMWELL, B. I am of the same opinion. The limitation of responsibility by the contract set out in the replication is not applicable to the case disclosed by the pleading.

As to the tenth plea, which answers the complaint of a simple non-feasance—the non-performance of a contract—by the averment that the contract was not made with the plaintiff, the objection to it has been given up. But as to the eleventh plea, my opinion is as intimated by the Chief Baron, and for this reason. The plaintiff says, "You had my goods in your possession, and you delivered them wrongly, no matter whether wilfully or negligently; either way you did wrong." The defendants reply, "I bargained with some one else to carry them." But how does this furnish an answer? The contract is no concern of the plaintiff's; the act was none the less a wrong to him. On the demurrer to this plea, therefore, the plaintiff is entitled to judgment.

CHANNELL, B. I am of the same opinion. I wish to add nothing to what has been said as to the non-liability clause, except to observe that no question here arises as to what contract can be made between the parties, but only as to what the contract really is; and the contract is, I think, limited to exemption from liability in certain cases which do not include the one before us.

As to the tenth plea, I think it an answer to the first count, which alleges in substance a breach of contract. But the eleventh plea, which is identical with the tenth, is no answer to the second count, which is not to be considered as charging the mere breach of a contract by non-performance, but as charging something done by the defendants in the nature of an affirmative act, injurious to the plaintiff's property. On that ground the plaintiff is entitled to our judgment on the demurrer, to this plea.

PIGOTT, B. I concur; but I must add that I have shared the doubts expressed by my lord as to the eleventh plea.

Judgment for the plaintiff on the demurrer to the replications to the fourth and seventh pleas, and on the demurrer to the eleventh plea; for the defendants on the demurrer to the tenth plea.

Attorney for plaintiff: *H. H. Lawrence.*

Attorneys for defendants: *White, Borrett, & White.*

EAST GLOUCESTERSHIRE RAILWAY COMPANY *v.* BARTHOLOMEW.
SAME *v.* SMITH.
SAME *v.* PRICE.

1867
Nov. 20.

Company—Shareholder—Register—Construction—8 *Vict. c.* 16, *ss.* 8, 9, 28.

Section 8 of 8 Vict. c. 16, enacts that a person shall be deemed a shareholder "who shall have subscribed, &c., and whose name shall have been entered on the register of shareholders hereinafter mentioned:" s. 9 prescribes the mode of making and keeping the register, and (inter alia) that it shall "distinguish each share by its number:"—

Held, that s. 8 was complied with, although the register did not shew the distinguishing numbers of the defendant's shares, it being proved, aliunde, that the shares were, in fact, numbered.

Semble, the provisions in s. 9, as to the mode of keeping the register, are directory only, except with reference to the use of the register as primâ facie evidence under s. 28.

The plaintiffs' special act provided (s. 5), "that the company should not *issue* any shares created under the authority of this act, nor should any share *vest* in the person accepting the same, until one fifth of the amount of the share was paid up."

Held, that the word *issue* referred to the issuing of certificates of shares, and the word *vest* to the vesting of shares so as to be property and capable of transfer; but that the section did not make the payment of one fifth a condition precedent to the liability as a shareholder of the person accepting the share.

6 Eq 185.
9 Eq 95,
[illegible]
6 Ch 656, 66
662,
7 Ch 138, -9
1 C.P.D. 20
212,
2 Ch.D. 67

Action for calls on shares.

Plea 1. Never indebted.

2. That the plaintiffs were incorporated by, and the shares issued under the authority of, the East Gloucestershire Railway Act, 1864; and that one fifth of the amount of the shares in the declaration mentioned were not, nor was any part thereof, paid up in respect of the said shares, or any of them, at the time of the making of either of the said calls, or at all.

Issue, and to the second plea demurrer; joinder.

At the trial before Blackburn, J., at the Croydon summer assizes, 1867, the plaintiffs produced the sealed register of the company kept under 8 Vict. c. 16, s. 9, in which the defendant was entered as the holder of 10 shares of 10*l.* each, but in that book the distinguishing numbers of the shares were not indicated. They also produced a book of shareholders' addresses, kept under s. 10, in which the defendant was also entered as the holder of 10

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shares, which were distinguished by their respective numbers. It was also proved that the defendant had signed the subscription contract for 10 shares. The making and notice of the calls were duly proved.

It was objected that the defendant was not shewn to be a shareholder, inasmuch as he was not shewn to be the holder of any specific shares; and it was further objected that the register was defective in not specifying the distinguishing numbers of the shares as provided by s. 9; that the defendant's name was, therefore, not entered in any register within the act, and he was therefore not a shareholder within the description of s. 8.

The learned judge was of opinion that the register did sufficiently indicate the specific shares held by the defendant, although inartistically, and further that the provisions of s. 9 were directory only; but in deference to *Irish Peat Company* v. *Phillips* (1), he reserved the point.

With respect to the second plea, it was proved that nothing had been paid on the shares, and it was contended that, either no shares had issued, in which case the defendant could not be a shareholder, or, if they had issued, it was in contravention of the act, and the company therefore could not make calls. This point was also reserved. No certificates had been issued.

A verdict was therefore taken for the plaintiffs, with leave to the defendant to move to enter a verdict for him upon the points reserved. (2)

The following sections of 8 Vict. c. 16, are material:—

S. 6. "The capital of the company shall be divided into shares of the prescribed number and amount; and such shares shall be numbered in arithmetical progression, beginning with number one; and every such share shall be distinguished by its appropriate number."

S. 8. "Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise

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7 Jur. N.S. 413, 1190

(1) 1 B. & S. 598, in error, 629; 30 L. J. (Q.B.) 114, in error, 363.

(2) Two other actions by the company for calls, against *Smith*, and against *Price*, were tried at the same time, *M. Chambers*, *Q.C.*, and *Matthews*, appearing for *Smith*, and *Hannen* for *Price*; the material facts in all three cases were identical, the points reserved were the same, and they were argued together.

have become entitled to a share in the company, *and whose name shall have been entered on the register of shareholders hereinafter mentioned*, shall be deemed a shareholder of the company."

S. 9. "The company shall keep a book, to be called the 'register of shareholders,' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons, entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares, and the surnames or corporate names of the said shareholders shall be placed in alphabetical order," &c.

S. 10 provides for the keeping of a "shareholders' address book," which is not required to contain either the number of shares held by each shareholder, or their distinguishing numbers.

S. 11 entitles the holder of any share to receive a certificate specifying the share to which he is entitled.

S. 21. "The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company," &c.

S. 22. "It shall be lawful for the company from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them," (as therein mentioned).

Ss. 25, 26, 27, give power to the company to bring actions for calls, and regulate such actions, and by

S. 28. "The production of the register of shareholders shall be primâ facie evidence of such defendant being a shareholder, and of the number and amount of his shares."

By the company's special act 27 & 28 Vict. c. cclxxxv., it was provided:—

S. 3. That certain persons named, "and all other persons and corporations who have already subscribed, or shall hereafter subscribe to the undertaking, and their executors, administrators, successors and assigns respectively, shall be united into a company

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for the purpose of the undertaking, to be called the East Gloucestershire Railway Company," &c.

S. 5. "One fourth of a share shall be the greatest amount of any one call which the company may make on the shareholders, and three months at the least shall be the interval between successive calls, and three fourths of the amount of a share shall be the utmost aggregate amount of calls that may be made in any one year upon any share: *provided* that the company shall not issue any share created under the authority of this act, nor shall any share vest in the person accepting the same, unless and until a sum not being less than one fifth part of the amount of such share shall have been paid up in respect thereof."

A rule having been obtained to enter the verdict for the defendant pursuant to the leave reserved, it came on to be argued with the demurrer.

Hawkins, Q.C., *Watkin Williams*, and *Fullerton*, shewed cause. First, the register, although defective in so far as it did not comply with the provisions of s. 9, was nevertheless the register of the company. In *Irish Peat Company* v. *Phillips* (1), there was no evidence that the shares had ever been numbered at all, and even in that state of things the Court below appeared not to think the specific numbering essential, and only decided the case on the supposed authority of *Wolverhampton New Waterworks Company* v. *Hawksford* (2), which, however, the Court of Error thought not to be in point. The judgment was ultimately affirmed in error (3), on the ground that the signature of the defendant to the plaintiffs' deed was there necessary, and a doubt is intimated whether it is necessary that the shares should be numbered on the register. In *Wolverhampton New Waterworks Company* v. *Hawksford* (2), there was no valid register at all. Neither case, therefore, is an authority for the defendant, and the former case is rather opposed to his contention.

Secondly, with respect to the clause of the special act relied on, the defendant has signed the subscription contract, and is there-

7 Jur NS 413, 1190

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(1) 1 B. & S. 598, in error, 629; 30 L. J. (Q.B.) 114, in error, 363.

(2) 7 C. B. (N. S.) 795; 29 L. J (C.P.) 121. 6 Jur NS 632

(3) 1 B. & S. 629; 30 L. J. (Q.B.) 363. 7 Jur NS 1190

fore, a member of the company within s. 3. He must, therefore, be a shareholder, and liable to calls under s. 21 of 8 Vict. c. 16. If the 5th section were held to absolve him from his liability, it would amount to a legislative permission to him to say, "I will not pay, because I have not paid;" but it admits of a construction effecting the obvious intention of the legislature, and not leading to any absurd conclusion. The word "issue," which has no meaning as applied to shares themselves, refers to the issuing of certificates, and the share is said to "issue" when the certificate is placed in the hands of the shareholder. No issue, therefore, has here taken place, although the share has been *allotted*, which is the word the legislature would have used, if they had intended to express what the defendant contends them to have meant. Again, the word "issue" points to rights, and not to liabilities, and means that until payment the shareholder shall not be able to transfer his shares or claim his certificate. The intention and effect of both branches of the provision is the same: to protect the company against a traffic in their shares by persons who have paid nothing. This object is accomplished, first, by prohibiting the issue of certificates, which are the symbols of ownership, and the means of traffic; and, secondly, by denying to the shareholder any of the usual rights of a shareholder, until he has paid the one fifth on his shares. The shares, therefore, have never issued within the meaning of the act, and the second plea is not proved.

Montagu Chambers, Q.C., Matthews, and *Jelf* (1), in support of the rule. First, the register is defective, and the defendant, therefore, cannot be a registered shareholder, although he may be liable to be sued on his subscription contract. The case of *Wolverhampton New Waterworks Company* v. *Hawksford* (2) is an authority for this position, and is strengthened by the decision in *Irish Peat Company* v. *Phillips* (3), following it. The words of Lord Brougham, also, in *Bain* v. *Whitehaven and Furness Junction Railway Company* (4), with reference to the corresponding section of the Scotch Act

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(1) *Hannen* also argued for the defendant *Price*: see note (1), at p. 16.

(2) 7 C. B. (N. S.) 795; 29 L. J. (C. P.) 121. 6 Jur NS 1682.

(3) 1 B. & S. 598; 30 L. J. (Q.B.) 114. 7 Jur NS 1413.

(4) 3 H. L. C. 1, at p. 21.

(8 & 9 Vict. c. 17, s. 9), strongly favour the necessity of an exact compliance with the requirements of the statute.

[Bramwell, B. Lord Brougham's words all refer to the case of making the register primâ facie evidence under s. 29, corresponding to the 28th section of the English act. He says, at p. 22, "A great privilege is bestowed by the act upon the company, neither more nor less than that of making evidence for itself;" and again, at p. 23, "So disposed am I to look at the strict execution of this direction as a condition precedent to the enjoyment of the extraordinary privilege conferred by the 29th section, of making a man's own writing evidence for himself, and against another party," &c. In the present case there is independent evidence of the defendant being a shareholder.

Kelly, C.B. The defendant's argument would go to shew that if in any respect the register was incorrect, the company could not recover a call.]

Any substantial defect would prevent them, and this defect is such. For if there are no specific shares allotted to a proposing shareholder, there can be no property in them; he can make no definite claim for certificates, and if shares were issued in excess of the capital, there would be no means of determining the rights of those who had had unnumbered shares allotted to them. And here we have, in fact, no evidence that the shares have ever been divided by specific numbers, for the unsealed book cannot take the place of the sealed register, and is not referred to in it. The case, therefore, is really the same as that of *Irish Peat Company* v. *Phillips*. (1) But, secondly, the defendant is prevented from being a shareholder by s. 5 of the special act, which adds a condition to s. 8 of 8 Vict. c. 16. How can he hold shares which have never been issued, and which have never existed in him, or how can such shares be forfeited under s. 29? The intention of the clause was to prevent a concern not bonâ fide representing capital, from being put before the public, and exercising statutory powers without any security that they can carry out the purposes of the act. Clauses to this effect are found in 7 & 8 Vict. c. 113 (the act regulating joint-stock banks), s. 5, and in the special act referred to in *Norwich and Lowestoft Navigation* v. *Theobald* (2), in which case non-compliance with the condition was held to disable the company from making a call. If, on the other hand, the only object had been to prevent a trafficking in shares, this could have been much more simply and clearly provided for by saying that no shareholder should transfer his shares until one fifth was paid, as is provided with respect to shares on which calls are due, by s. 16 of 8 Vict. c. 16. They also referred to *Midland Great Western Railway of Ireland* v. *Leech* (1), and *Birkenhead, &c. Junction Railway Company* v. *Webster.* (2)

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(1) 1 B. & S. 598, 629; 30 L. J. (Q.B.) 114, in error, 363.

(2) Moo. & M. 151.

7 Jur NS 413. 1170

KELLY, C.B. This is an action for calls, charging the defendant as a shareholder in the plaintiffs' company, and the defence raised on the pleadings is, that he is not a shareholder within the meaning either of the general or the special act relating to the subject. It appears that he has subscribed for shares, and that shares have been allotted to him; but it is said, first, that he has not been duly entered on the register; and, secondly, that the preliminary conditions required by the special act have not been complied with.

With respect to the first point, which depends on the construction of 8 Vict. c. 16, a register of shareholders was put in evidence, in which the defendant's name appears, with the number of shares held by him, but without the distinguishing numbers of the several shares. These numbers, however, are given in another book, the "shareholders' address book," kept by the company under the provisions of s. 10. Now, it is to be observed that s. 8, which states the conditions on which a person is to be deemed a shareholder, only requires that "his name shall have been entered on the register of shareholders hereinafter mentioned," and does not itself point out what particulars the register is to contain; and, again, s. 6, which provides that the capital shall be divided into shares, "numbered in arithmetical progression," does not say by what means or in what document this numbering is to be made and recorded. Now, in the present case, there has been a subscription for shares, and an allotment of shares; the defendant's name has been entered on the register of the company as a shareholder; the shares have been, in fact, divided by numbers distinguishing each share, and the particular numbers of the defendant's shares have been inserted in the book kept by the company under s. 10. The defendant is, therefore, a shareholder, unless s. 9 is to be considered as totally uncomplied with; that is, unless it is to be held that no register of shareholders exists, by reason of all the requirements contained in that section not having been satisfied. But if this were so, if the section were held to be more than a directory enactment prescribing what information is to be afforded by the register, the consequence would be that in any action against a shareholder where the register was, as it must necessarily be, put in evidence, the action might be defeated by the omission of a single name, or any other defect in its compilation. Therefore, on the fair construction of the act, we must hold that this is a register made and kept in pursuance of it, and that the defendant's name being entered on it as a shareholder, that condition of his liability is satisfied.

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(1) 3 H. L. C. 872.

(2) 6 Ex. 277.

We were referred to two cases: one decided in the Common Pleas, the other in the Queen's Bench and Exchequer Chamber, as authorities that, unless the register contains not only the name of the shareholder, but also the numbers distinguishing his shares, there is no compliance with the act, and the register cannot be received in evidence. In the first of these cases, *Wolverhampton New Waterworks Company* v. *Hawksford* (1), the plaintiffs seeking to charge the defendant as a shareholder, gave in evidence the register under s. 28, and substantially there was no other evidence. And if the company resort to, and rely on, that section, then no doubt, since evidence of every other kind is dispensed with, the register must contain within itself all the particulars necessary to charge the defendant with liability in the action. The instrument there held not to be a register within s. 9, was an informal document, not appearing, as the Court thought, to have been intended as a register, though afterwards proffered as such at the trial. The case is therefore no authority for the defendant in the present action, where the document is a formal register, and where there is other evidence of the defendant's being a shareholder. The second case was that of *Irish Peat Company* v. *Phillips* (2).

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(1) 7 C. B. (N.S.) 795; 29 L. J. (C.P.) 121. 6 Jur NS 632.

(2) 1 B. & S. 598, in error, 629; 30 L J. (Q.B.) 114, in error, 363. 7 Jur NS 413, 1190

Of that case it may be sufficient to say, that the decision in error proceeded on the ground that the defendant was not a shareholder under the charter of the company, nor indebted by virtue of their deed of settlement, because he had not executed that deed; and, apart from the inclination of opinion, both in the Court below and in that above, being against the view that the mere want of numbering the shares in the register would be a bar to the action, there was in that case no evidence that the shares had, in fact, ever been numbered at all, that is, that numbers had ever been assigned to them. The case is, therefore, no authority for the non-liability of one who is proved to have satisfied the first branch of the description contained in s. 8, and whose name is, in addition, entered in the register as a shareholder.

The second objection is grounded upon the 5th section of the special act (27 & 28 Vict. c. cclxxxv.), and is to the effect that though there has been no failure to comply with the first part of the section, the concluding proviso prevents the defendant from being a shareholder (one fifth of the amount of his shares not having been paid), and therefore from being liable in this action. And it is contended, that the effect of this proviso is the same as that of the clause inserted in several acts incorporating joint-stock companies, by which it was enacted in express terms that the company should not exercise any of its statutory powers till a certain portion of its capital was not only subscribed but paid. But we have only to look at the language of the clause in question to see that its effect is entirely different. It applies not to the whole capital, but only to the individual shares: and if out of the whole number of shares the required fifth had been paid upon only a small fraction, the company would be entitled to issue to the owners of that fraction, and they would be entitled to claim, certificates of the shares on which that money had been paid.

What, then, is the real meaning and effect of the words used? If it were, that no one should be a shareholder so as to be charged with the payment of calls unless he had paid one fifth upon his shares, we should make the startling discovery that the legislature had provided that a man could take advantage of his own wrong, and say, "because I have not paid up a portion of what I ought to pay, you shall not compel me to pay the rest." This is so extremely improbable, that it is satisfactory to find a more reasonable construction to be both literally and substantially correct. If we consider the matter with reference both to the company and the public, we find that if the shares are not merely allotted, but their certificates issued and put in the hands of the shareholders, before anything has been paid upon them, every shareholder, having in his hands the symbol of his share, may go and sell it with a nominal, artificial and speculative, value before a single shilling of the capital has been actually realized. Now this is the danger against which the legislature intended to guard. I therefore agree with Mr. Hannen, in saying, that the proviso is inserted to protect the public; and that its effect is, that the company shall not be permitted to enable shareholders, and that shareholders shall not be enabled, to deal with their shares in any way, until by something having been paid upon them, they possess a real as well as a nominal value; and I add that, by curtailing the power of the company it also protects the company itself against the acts of its own shareholders.

It is further urged that, since the section provides that the share shall not vest in the person accepting the same, until the one fifth has been paid, it is impossible that, until then, the person so accepting can be a shareholder. But this provision only supplements the previous one. Not even if the company were disposed to issue and did issue certificates of shares in opposition to this section, and put them into the hands of the shareholder, could the shareholder make any use of them. Both together cannot make a share which shall be capable of being sold and transferred in the market. The defendant's construction would reduce the company to a total stand-still, since there is no other mode in which the company could compel payment of the money necessary to commence its business.

The effect then is, that any one who has subscribed for shares, and whose name is entered on the register, is to be deemed a shareholder, and being such for all purposes of liability the company are enabled, under s. 22 of the general act, to make calls upon him; and when those calls have been paid to the extent of one fifth of the amount of his shares, the rights of a shareholder vest in him, and he is entitled to avail himself of the provisions in his favour, and to call for certificates of his shares; but, before that time, he is none the less subject to liability. This rule must, therefore, be discharged.

Bramwell, B. I am of the same opinion. A very good case was made against the defendant, by shewing that he had signed the subscription contract, that particular shares had been allotted to him, and that his name was on the register. But two objections have been made to the plaintiffs' recovering, the first founded on the special, the second on the general, act.

First, it is said, that one fifth of the amount of the shares has not been paid, and that, therefore, by s. 5 of the plaintiffs' special act, the defendant cannot be a shareholder. We might almost decline to give an opinion on the true construction of the section, and content ourselves with simply saying that it cannot mean what the defendant says it means. It is impossible to suppose that the legislature should enable a man to say, "I will not pay, because I have not paid." But the true construction is not difficult to find, and it is one fulfilling the object which Mr. Hannen has properly ascribed to it, that is, to protect the public, aad to make the concern more solid, and for that purpose to allow no transfer of shares until they represent some actual capital. The word "issue" is inaccurate as applied to shares, and the only way in which a meaning can be given to it is by supposing it to refer to certificates of shares. It is used in this connection in the marginal note to s. 11 of the 8 Vict. c. 16, though not in the text of the act itself, and the draftsman of the plaintiffs' special act may very possibly have had this in his mind. Again, the word "vest" is relied upon, to shew that the defendant could not be a shareholder, no shares having vested in him. My answer is that the shares have not vested in him so as to give him a property, but still he is a shareholder in respect of his having accepted them. For, how can he accept them, unless in some sense they vest in him?

The second point made by the defendant is that he is not shewn to have had any such shares as alleged in the declaration, that is, attributed, numbered shares. I do not stop to discuss whether it is necessary to make a shareholder liable to calls that the shares should have been actually numbered. There is authority to shew that it is necessary; though there is great weight in my brother Blackburn's view, that that part of the act is merely directory. But we need not decide that question, for here it has been clearly shewn that the defendant had numbered shares, and the objection only is that their numbers were not inserted in the register, and that there was, therefore, no such register as is described in s. 8 of 8 Vict. c. 16. But I am of opinion, that at least this part of the provision is directory. It is impossible that, if a company give to an applicant numbered shares, on which calls are paid, and which are entered with the name of their proprietor on their register, either he or any one else should be at liberty to say that he is not a shareholder. Our judgment must, therefore, be for the plaintiffs.

Pigott, B. Two points have been made for the defendant. With respect to the first, which turns on the proviso in s. 5 of the plaintiffs' special act, I read that proviso (after some doubt) in the same way as my lord and my brother Bramwell. The defendant contends that the plaintiffs have no power to make calls until one fifth has been paid up on the shares. If this had been meant, I think it would have been said more plainly, instead of being wrapped up in words which point more naturally to a restriction of the shareholder's rights. Our construction will give a sufficient and satisfactory meaning to the clause, for, by preventing the circulation of the shares, it will effect the object which the legislature evidently had in view, of protecting the public and the company against speculation.

The second point turns upon the construction of ss. 6, 8, 9 of 8 Vict. c. 16. Looking at the two books, the sealed register and the unsealed book, we find that the defendant has had numbered shares allotted to him, and that he is entered on the register as the holder of these shares, though without the addition of their descriptive numbers. The question then is, whether there is anything in s. 9 to make the compliance with every particular directed to be inserted in the register a condition precedent to the shareholder's rights or liabilities? I cannot read it so, and such a construction would manifestly cause great inconvenience. I find one of the directions is, that the shareholders' names shall be placed in alphabetical order, and it cannot be supposed that if by mistake one of the names was out of its right order, the company would be prevented from recovering calls. My brother Blackburn has expressed a very probable opinion, that the whole clause is directory, and we may certainly go so far as to say, that the insertion of the distinguishing numbers upon the register is not essential. If it were attempted to use the register under s. 28 as the only evidence of liability, the case would admit of quite different considerations, and it may be that a register not complete in all its parts, at least so far as concerned the individual shareholder, would not be within that section. But here, evidence being given aliunde of the other necessary facts, the remaining fact, namely, the insertion of the defendant's name in the register of the company, is sufficiently shewn by the production of the register in question.

Rule discharged, and judgment for the plaintiffs on the demurrer.

Attorneys for plaintiffs: *Johnston, Farquhar, & Leech.*
Attorneys for defendant: *Pawle & Co., for Marshall, Cheltenham.*

Nov. 23.

PEARSON AND ANOTHER *v.* GLAZEBROOK.

County Court—Jurisdiction—Title—Landlord and Tenant.

The 50th section of 19 & 20 Vict. c. 108, giving to landlords a summary remedy in the county court, does not apply where a question of title is involved; and if the alleged tenant makes a bonâ fide claim of ownership, the jurisdiction of the county court judge is ousted.

A SUMMONS, under s. 50 of 19 & 20 Vict. c. 108, was, on the plaint of J. and W. Pearson, issued out of the Shropshire County Court against the defendant, as their tenant. On the hearing of the plaint, the plaintiffs proved that they had been, since 1861, lessees of a colliery and premises, including a number of cottages inhabited by the colliers, and for which a nominal rent was paid, varying, in the time of preceding lessees, from 5*s.* to 30*s.*, but fixed, since their occupation, at 5*s.* a year; that the defendant occupied one of these cottages, and that the rent had been continually paid by him for thirty-two years; that the plaintiffs had recently

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PEARSON v. GLAZEBROOK.

changed these alleged yearly tenancies into monthly tenancies; and that the defendant had consented to this arrangement, and had since then twice paid the monthly rent reserved; but, on receiving afterwards a month's notice to quit, had refused to go out. The defendant, on the other hand, claimed to be a freeholder, subject only to payment of a quit rent; and contended that, a question of title having arisen, the judge had no jurisdiction to decide the plaint. The learned judge was of that opinion, and declined to adjudicate.

Gray, Q.C., having obtained a rule, calling upon the judge to adjudicate,

J. O. Griffits shewed cause. The 9 & 10 Vict. c. 95, and 19 & 20 Vict. c. 108, are to be read together, and the prohibition of trying questions of title contained in s. 58 of the former, applies equally to all proceedings under the latter. This appears the more clearly from s. 25 of the later act, allowing such questions to be tried by consent of the parties, but at the same time providing that the judgment shall not be evidence of title against the parties or privies in any other action. But further, s. 50 of the later act is only substituted for s. 122 of the earlier act; and upon the latter section the case of *Kerkin* v. *Kerkin* (1) is a direct decision that it only applies to the case of admitted tenancies.

Gray, Q.C., in support of the rule. The complaint against the county court judge is not that he decided wrongly, but that he refused to decide anything. In the case of *Re Fearon* v. *Nowall* (2), it was held that the mere fact that the tenant shews cause against the order does not oust the jurisdiction of the judge, who must satisfy his own mind as to the sufficiency of the cause shewn; for it must be such as "constitutes, in the opinion of the judge, a defence." It does not here appear that the judge has formed any opinion on the sufficiency of the defence. The fact of tenancy is a fact which he must find one way or the other, for it is the fact on which his jurisdiction depends. He must clearly enter upon the inquiry; and, if he may enter on it, he may also decide it, although a question of title may incidentally arise. Further, the restrictive clause as to questions of title does not apply, for that

(1) 3 E. & B. 399. 18 Jur 813. (2) 17 L. J. (Q. B.) 161.

refers only to actions; but this is a summary proceeding, not an action.

MARTIN, B. We are all of opinion that the county court judge was right. It seems to me that the act shews, on the face of it, that it applies only to a clear case of landlord and tenant. A summary remedy is given to the landlord; but, if it turns out that there is reasonable ground for supposing that a question of title will arise, the power and jurisdiction of the county court judge is gone. Now, the judge has heard the plaintiffs and the defendant, and has come to the conclusion that this is a bonâ fide defence set up by the tenant, involving a question of title—namely, that he was owner in fee simple, subject to a quit rent. He has, therefore, determined the question, so far as was necessary to oust his jurisdiction. It is similar to the question which frequently arises before magistrates, whether there is a bonâ fide defence to a rate. The judge is certainly not so wrong that we can compel him to proceed; but I must add that, for my own part, I entirely concur with what he has done.

CHANNELL, B. I am of the same opinion. There was formerly no power in the county courts to try questions of title, nor has any power been given to them by the 9 & 10 Vict. c. 95, or 19 & 20 Vict. c. 108; but by these acts, where the relation of landlord and tenant exists, the judge may determine questions arising out of it. It is not, however, enough to entitle the landlord to this remedy, that he should state the relation to exist; in order to determine whether the alleged tenancy has been put an end to, the judge must first see whether it exists, and for that purpose must examine into the case. Here the judge has examined into the case, and finds, on the evidence given, that title is in question; and, having found this fact, he is no longer able to exercise jurisdiction, and is bound to decline proceeding further. He has, therefore, done exactly what he was bound to do.

PIGOTT, B. I am of the same opinion. I think the judge has gone exactly to the right point. Having heard the claim and the defence of the respective parties, he comes to the conclusion that

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a question of title is involved; and if he had proceeded further he must have tried and determined a question of title, and not a mere question of landlord and tenant.

Rule discharged.

Attorneys for plaintiffs: *Benbow, Tucker, & Saltwell, for Corser & Walker, Stourbridge.*

Attorneys for defendant: *Eldred & Andrew.*

Nov. 30.

[IN THE EXCHEQUER CHAMBER.]

LORD LECONFIELD *v.* DIXON AND OTHERS.

Inclosure Acts—Game—Reservation of Exclusive Right of Shooting—Construction.

8CP515.
-524-6,
9CP526-7
541-2

By a private inclosure act an allotment was directed of certain waste lands; by s. 24 the mines, &c., under the allotments were not to be taken into the valuation of the allotments, they being reserved to the lord; by s. 32, subject to the reservations in the act, the allotments were to be the freeholds of the allottees; by s. 34 it was provided that the lord should have "all rents, &c., piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered as game, &c., and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances," in as ample a manner as they are now or have been heretofore used, exercised, and enjoyed by him, or as he "might or could have held, used, &c., the same," in case the act had not been passed; that section contained no reference to mines, but s. 35 reserved them to the lord, with certain powers of search and working. Before the act there was no right of free warren in the lord:—

Held, reversing the judgment of the Court below, that the act reserved to the lord an exclusive right of sporting over the allotments.

APPEAL from the judgment of the Court of Exchequer (1), making absolute a rule obtained by the defendants to enter a verdict for them, on the ground that by a private inclosure act, the material sections of which are sufficiently stated in the following judgment, an exclusive right of sporting was not reserved to the plaintiff, the lord of the manor.

June 22. *Manisty, Q.C.* (*Kemplay* with him), for the plaintiff. *Temple, Q.C.* (*Herschell* with him), for the defendants.

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(1) See Law Rep. 2 Ex. 202.

The same cases were cited and arguments urged as in the Court below.

Cur. adv. vult.

Nov. 30. The judgment of the Court (Bovill, C.J., Willes, Blackburn, Mellor, Shee, and Montagu Smith, JJ.) was delivered by

BOVILL, C.J. The question in this case is, whether the plaintiff was entitled to the exclusive right of shooting game, and sporting over certain lands of the principal defendant's, in the county of Cumberland, which had been allotted under an inclosure act. The plaintiff was lord of the manor of Croglin, and at the time the inclosure act was passed, the lords of this and another manor were seised of the soil of the wastes which were allotted under it. The determination of the question depends upon the construction to be placed upon the provisions of the special inclosure act.

At the trial before my brother Lush, at Carlisle, he ruled in favour of the plaintiff, and directed a verdict to be entered accordingly, but reserved leave to the defendants to move to enter it in their favour.

Upon a motion to the Court of Exchequer, that court directed the verdict entered for the plaintiff to be set aside, and ordered it to be entered for the defendants. The decision is reported in the Law Reports, 2 Ex. 202.

The present appeal was brought against that decision. Upon carefully considering the provisions of the inclosure act, together with the reasons assigned by the Court of Exchequer, and the arguments that have been addressed to us, we are unable to come to the same conclusion as the Court below, and concur in the view taken by my brother Lush at the trial.

The wastes of the manor were very extensive (5,900 acres), and there can be little doubt that the shooting and taking game would be one material right to be exercised over them by the lord, and arising from his ownership of the soil. The inclosure act was passed with the assent of the lord, and of those who were entitled to commonable rights over the wastes of the manor; it is in the nature of a contract between the parties, and should be construed according to the fair and ordinary meaning of the language employed.

1867

LORD LECONFIELD v. DIXON.

By the Great Croglin Inclosure Act (48 Geo. 3, c. 47 of the private acts), commissioners were appointed to inclose the wastes according to the provisions of that act, and of the General Inclosure Act, which had been passed a few years previously, viz., the 41 Geo. 3, c. 109, so far as they were not controlled by, or repugnant to, the Local Act.

The 20th section (p. 14), declares that the allotment to the lord is to be in lieu of, and as a full compensation for, his right and interest in and to the wastes, and his right over the same, "save and except as thereinafter excepted, and thereby reserved to him."

After directing the allotment of the residue of the lands amongst those who were entitled to rights of common, it is, by s. 24 (p. 18), expressly provided that the mines, minerals and metals, and all stones and fossils, lying under any of the allotments, shall be reserved to the lord of the manor for the time being.

These allotments by s. 32 (p. 24), were to be and become estates of freehold in the parties to whom they were allotted, but subject and without prejudice to the right of the lord to the mines, minerals, stones, fossils, royalties, liberties, privileges, powers, and authorities, or any of them, thereby reserved to him.

Then comes the proviso by s. 34 (p. 25), upon which the present question mainly depends, which is in the following words: "Nothing in this act contained shall be construed or adjudged to defeat, lessen or prejudice the right, title or interest of the said lords of the said manors respectively (1), for the time being, of, in, or to the seignories or royalties, franchises and liberties, incident and belonging to the said several manors; but the said lords of the said several manors for the time being shall at all times for ever hereafter have, hold, take, and enjoy, all rents, fines, suits and services to or at the lord's courts, perquisites and profits of courts, and suits and services to the lord's mill, *piscaries, fishing, hunting, hawking, fowling, and all beasts and birds considered as game*, goods and chattels of felons and fugitives, felons of themselves and put in exigent, deodands, waifs, estrays, forfeitures, escheats, and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions and appurtenances whatsoever (except such as are expressly taken away by this act) in the same, and as full, ample, and

(1) Other manors were included in the private act: see Law Rep. 2 Ex. p. 202.

beneficial manner to all intents and purposes, as they are now held, taken and enjoyed, or have been anciently or heretofore used, exercised and enjoyed, by the present or any former lord or lords of the said manors respectively, or as he, she, or they, or any of them, might, or could have held, used, exercised, received, taken or enjoyed the same, in case this act, or the said recited act (41 Geo. 3, c. 109), had not been made."

The next section expressly reserves to the lord the mines, minerals, ores, stones, fossils, and quarries (subject to certain specified exceptions), with power to work them, and to do what is necessary for that purpose.

Looking to the general scope and object of the 34th section, and to the language which is there used, it appears to us to amount to an enactment that the lord shall, at all times for ever thereafter, have, take, and enjoy all piscaries, fishing, hunting, hawking, and fowling; and all beasts and birds considered as game; and all other royalties, liberties, privileges and appurtenances whatsoever, except such as are expressly taken away by the act: in the same and as full, ample, and beneficial a manner, to all intents and purposes, as they were then held, taken and enjoyed by the lord, or as the lord might have held, taken or enjoyed them, in case the act had not been passed.

There can be little doubt as to the sense in which the members of the legislature would understand such words, and of their intention to preserve the lord's right to the game, whether arising from his ownership of the soil or otherwise; at the same time, the Court must be satisfied that, reading the whole of the clause together, this intention can be collected from the terms in which the clause is framed.

Considering the language of that clause, we cannot doubt that the right to the game, and of shooting over the allotments, was intended to be reserved to the lord; and it appears to us that this is the true and proper interpretation of the whole section, although the earlier part of it refers only to the seignories or royalties and liberties incident and belonging to the said manors.

The 40th section of the General Inclosure Act of 41 Geo. 3, c. 109 also shews that an extensive protection was intended to be given to the lord's rights, incident or belonging to the manor or the lord, and tends to confirm the view which we take of this case; and the present section in the special act was probably intended to give a still larger protection to the lord than was contained in the general act.

It is very difficult to place a construction upon the whole of the language of the 34th section, which would give effect to its words, and yet exclude the right of the lord to take the game; and we think there is a sufficient expression of the intention to preserve to him the right, to which he was previously entitled, of taking the game, although it was a right arising from his ownership of the soil, and not in the nature of a seignorial right. Indeed, as was said by Mr. Justice Wightman, on delivering the opinions of the majority of the judges in the House of Lords, in the case of *Ewart* v. *Graham* (1), "It is difficult to suggest a form of words better adapted to continue the right;" or, as Lord Chancellor Campbell, in the same case, stated (2): "He did not know how it could be more clearly expressed."

The authorities that were cited for the defendants on the argument, and in the Court below, were decided upon acts of parliament somewhat similar to the present, but the words were not the same as those which have been used in this instance.

The language of the act now in question is even stronger in favour of the lord's right to the game being preserved than it was in *Ewart* v. *Graham.* (1). The saving proviso there was framed in a similar manner to the proviso in this act of parliament, and is not distinguishable from it; and we think the present case falls within, and must be governed by, the decision of the House of Lords in that case. Our judgment, therefore, is in favour of the plaintiff; and the judgment of the Court below will be reversed.

Willes, J. If the decision of this case depended upon reason, I should have agreed with the Court of Exchequer; but I am constrained by superior authority not to express my dissent from the opinion of the majority of this Court.

Judgment reversed.

Attorneys for plaintiff: *Jennings, White, & Buckston, for S. & S. G. Saul, Carlisle.*

Attorneys for defendants: *Nicol & Son, for Cant & Fairer, Penrith.*

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(1) 7 H. L. C. 331, 343. 5 Jur NS 773.774

(2) 7 H. L. C. at p. 346. 5 Jur NS 775

THE DROITWICH PATENT SALT COMPANY, LIMITED, *v.* CURZON.

1867
Nov. 11.

5 Ch 39
10 Ch D 6
22 Ch D 3
361, 68

Company—Existing Company registering under the Companies Act, 1862—*Power to Reduce Capital—Effect of Registration—Loss of Power of Reduction—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 196.

A company who have, under their original deed of settlement, a power to reduce their capital, lose that power by being registered as a "Company, Limited" under the Companies Act, 1862, part 7.

Special Case stated for the opinion of the Court under the Common Law Procedure Act, 1852, s. 46.

The plaintiffs are a company originally established in the year 1826, under the name of the "Droitwich Patent Salt Company," and the defendant is the registrar of joint-stock companies. By the plaintiffs' deed of settlement the capital of the partnership was fixed at 125,000*l.*, in 5000 shares of 25*l.* each. The deed provided that eight of the partners should act as managers, and have the whole management of the mode of carrying on the company's works and of the affairs of the partnership; that they should make the rules and regulations, and prescribe the orders and directions relating to the concerns of the partnership, and *alter and repeal* the same, as they in their discretion might think proper, so that the same be not inconsistent with, or repugnant to, the fundamental principles or constitution of the partnership; and that no new rules or regulations in any manner altering the fundamental principles or constitution of the partnership should be binding unless the same should be confirmed by two-thirds of the partners present at two successive extraordinary general meetings, to be specially called for the purpose.

All the 5000 shares were issued, and the full sum of 25*l.* was paid upon each. In 1834, certain alterations were duly made in the rules of the company, and embodied in a supplemental deed of settlement, under which power was given to the managing partners at any general meeting to propose any new rules, and the *altering or repealing* of any of the laws and fundamental regulations of the partnership. If such new rule or alteration or repeal was carried by a majority of the votes of the partners entitled to vote, and was confirmed by two thirds of those present at a subsequent extraordinary general meeting, it was to become binding on the partnership.

In 1854, resolutions (which were afterwards embodied in a second supplemental deed) were passed, to increase the capital of the company to 150,000*l.* by the issue of 1000 shares at 25*l.* each. The new shares were to be offered at 15*l.* a share, and to rank as old shares. All these new shares were issued, and the full sum of 15*l.* was paid on each. In 1861, a further increase of capital (under fresh resolutions, which were embodied in a third deed) was made by the issue of 2000 shares at 5*l.* for each 25*l.* share, all of which were eventually issued, and the full sum of 5*l.* paid up on each. Two thousand additional shares, at the same price for each 25*l.* share, were issued in 1863 under similar resolutions, which were embodied in a fourth deed. On all of these, also, the full sum of 5*l.* a share was paid.

The company, therefore, in 1863 possessed a *nominal* capital of 250,000*l.* in 10,000 shares of 25*l.* each, of which 125,000*l.*, 15,000*l.*, 10,000*l.*, and 10,000*l.* had been paid up. But as the new shares had been issued at reduced prices, no further sum remained unpaid up, and the *real* capital of the company was 160,000*l.* In 1864 the company was registered under sec. 179 of the Companies Act, 1862, as a company with limited liability, by the name of the "Droitwich Patent Salt Company, Limited." At the time of registration the original and supplemental deeds were registered as the deeds of partnership constituting the company. The statement of capital required by s. 183 to be delivered to the registrar ran thus: "The amount of nominal capital is 250,000*l.*, divided into 10,000 shares of 25*l.* each, all taken up, 25*l.* having been paid on the first 5000 shares, 15*l.* on the next 1000 shares, and 5*l.* on the remaining 4000 shares; and the last 5000 shares were issued at 25*l.* each for the sums above mentioned."

In 1866 the following resolutions were duly passed at an extraordinary general meeting called under the provisions of the original deed of settlement and the first supplemental deed. First, that the capital of the company be altered and reduced. Secondly, that the capital of the company shall consist of 100,000*l.* divided into 10,000 fully paid-up shares of 10*l.* each. A copy of these resolutions was afterwards forwarded to the registrar and recorded by him. Later in the same year resolutions were come to by meetings duly convened for the purpose, enabling the directors, with the sanction of a special resolution of the company, to increase the capital, and subsequently it was resolved that "the capital of the company shall be increased from 100,000*l.* to 125,000*l.*, by the issue of 2500 new shares of the nominal value of 10*l.* each. A copy of this resolution was recorded by the registrar, to whom it had been duly forwarded. A notice of this increase was also given to him in conformity with s. 34 of the Companies Act, 1862. But he, after consideration, refused to record the amount of increase or the notice, alleging as a reason for his refusal, that the company had no power to reduce their capital, and that as such reduction of capital was an illegal act on the part of the company, he declined to record any document containing a statement of the company's capital being such reduced capital. The plaintiffs subsequently commenced an action against the registrar for the damage they had sustained by reason of his refusal to record the amount of the increase of their capital, and also claimed a writ of mandamus commanding him to record the same. After the issue of the writ in the action, this case was stated without pleadings. The questions for the Court were: 1st, whether the plaintiffs had power to alter and reduce their capital in the manner set forth in the above resolutions lastly referred to; and, 2ndly, whether the defendant was bound to record the increase of the capital thus altered and reduced.

The 24 & 25 Vict. c. 89, s. 8, enacts, that the memorandum of association of a company formed under the act shall contain, amongst other things, "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." S. 12 enacts, that any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution, as to increase its capital or to consolidate and divide it into shares of a larger amount than existing shares, or to convert its paid-up shares into stock; "but save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association."

Section 34 enacts, that notice of any increase of capital beyond the registered capital shall be given to the registrar, and he shall forthwith record the amount of the increase.

Part vii. of the Act regulates the manner in which existing companies are to register under the act.

Section 183 enacts, that previously to registration, any joint-stock company intending to be registered as a limited company shall deliver to the registrar a statement of "the nominal capital of the company, and the number of shares into which it is divided." Section 196 enacts, that "when a company is registered under this act in pursuance of this part thereof, all provisions contained in any . . . . deed of settlement or other instrument constituting and regulating the company . . . . shall be deemed to be the conditions and regulations of the company in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this act shall apply to such company in the same manner in all respects as if it had been formed under this act, subject to the provisions following, that is to say: . . . . 6thly, that nothing herein contained shall authorize any company to alter any such provisions contained in any deed of settlement . . . . or other instrument constituting or regulating the company, as would, if such company had originally been formed under this act have been contained in the memorandum of association, and are not authorized to be altered by this act." The section concludes with a proviso, that "nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this act in pursuance of this part thereof, by virtue of any deed of settlement or other instrument constituting or regulating the company."

Mellish, Q.C. (*H. Lloyd* with him), for the plaintiffs. The question whether the registrar was bound to record the increase of the reduced capital depends on whether he was right in recording the resolutions making the reduction. He was right in so doing if the company had power under their original deeds to reduce their capital, and if that power was preserved to them after they had registered as a "limited" company under the Companies Act, 1862. With regard to their original power, the language of the deeds is amply sufficient to confer it. [This point was conceded on the part of the defendant.] Then it was preserved to them after registration, by the proviso in s. 196 of the act. It may be granted that a new company formed under the act could not reduce its capital. The amount of capital must be stated in the memorandum of association (s. 8). No change can be made in any article in that memorandum unless expressly authorized by the act, and no such authorization of a reduction of capital can be found. But an old company registering under part vii., is in a different position, since by the proviso in s. 196, all its original powers are preserved to it. [He then proceeded to contend that assuming the registrar was wrong in declining to register the increase of the decreased capital, an writ of mandamus would lie against him at the suit of the company. But upon this point it became unnecessary for the Court to come to a decision.]

The Attorney-General (*F. Herschell* with him), for the defendant. By electing to register as a limited company the plaintiffs lost the power they possessed under their original deeds to reduce their capital. Suppose the contrary were held, the law must be impartially applied both to companies with their shares fully paid up and to those with their shares only partly paid up. But the latter class of companies would then, without any power of objection on the part of their creditors, be able to reduce their shareholders' liability to the amount actually paid up, after having registered their nominal capital at a figure inclusive of the unpaid portion of the shares. In the case of a company formed under the act, such a proceeding would confessedly be illegal: it can only now be effected under the special provisions of 30 & 31 Vict. c. 131, s. 9, et seq., and there is no reason why an old company should have greater power in this respect than a new one. The proviso in s. 196, preserving the rights possessed by old companies under their deeds, cannot be construed so as to give them a power opposed alike to the language and policy of the act, and which might work most prejudicially against their creditors.

Mellish, Q.C., in reply.

KELLY, C.B. I am of opinion that the defendant is entitled to our judgment. The question whether, under the circumstances of this case, a writ of mandamus might properly be claimed is important, but, as it is unnecessary to decide it, it may be best to express no opinion either one way or the other upon it. The ground on which I consider the defendant entitled to our judgment is this, that his refusal to register the notice of increase of capital was not a wrongful refusal.

The plaintiffs are a company which were in existence long before the passing of the Companies Act, 1862. At the time of the passing of that act, or rather a short time afterwards, when they called on the registrar to register them under the act, their nominal capital was 250,000*l.* But this capital was then farther stated to be "in 10,000 shares of 25*l.* each, all taken, 25*l.* having been paid on the first 5000 shares, 15*l.* on the next 1000 shares, and 5*l.* on the remaining 4000 shares;" and it was also stated that the last 5000 shares were issued at 25*l.* each "for the sums abovementioned." This amounts in substance to a declaration that the actual amount of capital had been reduced from 250,000*l.* to 160,000*l.* thus:—there had been a new issue of 1000 shares on the original capital of 125,000*l.*, at 15*l.* a share, and two subsequent issues of 4000 shares at 5*l.* each. The aggregate amount subscribed was, therefore, 160,000*l.*; and this was the real capital of the company, although their nominal capital amounted to 250,000*l.* It is said that the words in the requisition for registration, "the last 5000 shares were issued at 25*l.* each, *for the sums above mentioned,*" amount to a statement that these shares were to be considered as fully paid up. Probably this is so, and at all events the registrar entered the company on the register, whether by inadvertence or otherwise, under the act of 1862, in the manner above described. Subsequently, he was called upon to register a further change in the amount of capital. Resolutions were passed, reducing the capital to 100,000*l.* in 10,000 fully paid up shares of 10*l.* each. These resolutions were sent to the registrar and were recorded by him. In fact, he ought to have refused to record them. He did, however, perhaps per incuriam, enter the reduction of capital. Then he was called upon to register an increase of this reduced capital from 100,000*l.* to 125,000*l.* Notice was duly given to him of the proposed increase, but he refused to record the notice or the amount of the increase. Had he done so, then taking all the entries together as representing the constitution and condition of the company, the entry of 125,000*l.* would have amounted, in fact, to an entry, not of an increase, but of a reduction of the nominal capital of 250,000*l.* as originally registered, to 125,000*l.* The question, therefore, really is, whether the company were entitled to reduce their nominal capital, and to call upon the registrar to enter on the register a minute of that reduction?

Now, in the case of a company formed under the act of 1862, and also in the case of a company already formed, which afterwards is registered under the act, it is imperative on the registrar to enter on the register the amount of nominal capital. With regard to companies limited by shares formed under the act, s. 8 enacts that the memorandum of association shall, among other things, contain "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount," and before registration the registrar (who has to give a certificate which is to be conclusive evidence that all the requisites of the act in respect of registration have been complied with) must satisfy himself that the matter to be registered—the memorandum of association—contains all the elements prescribed by the different clauses of s. 8, and no alteration in any one of these elements can be made unless expressly authorized (s. 12). The law is the same where an existing company applies for registration. Section 183 provides that, previous to registration, a statement of "the nominal capital of the company, and the number of shares into which it is divided," is to be delivered to the registrar, and his certificate of incorporation is to be conclusive evidence (s. 192), that all the requisitions in the act contained in respect of registration have been complied with. It is quite clear, therefore, that the nominal amount of capital, and the number of shares into which it is divided, must be stated to the registrar, by whom that amount must then be entered on the register.

We next have to consider whether an existing company, when once registered, have any power under the act of 1862, to give effect to a provision contained in their original deed of settlement to reduce their capital. Now, there is an express power given to *increase* capital (s. 12), but nowhere can there be found an express provision pointing to a power to reduce, after once the nominal amount of capital has been registered. Is it then, the effect of the 6th clause of s. 196, to enable a company existing before the act, and registering under it, to exercise the power of reducing their capital; or rather, is it the effect of that article to legalize the continuance of a power already possessed under the original deed of settlement or articles of association? The language of the 6th clause is as follows [his lordship read the clause], and as far as that language goes it is not contended that there is anything in it to render lawful a reduction of capital. But there follows a proviso in these terms:—"Nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this act in pursuance of this part thereof by virtue of any act of parliament, deed of settlement, &c., constituting or regulating the company." Now, in construing this proviso, I take it that before the word "power" we ought to introduce the word "lawful," and that the proviso means that nothing in the act is to derogate from any "lawful power" before possessed by any company.

Is this power of reduction, then, a lawful power, a power which could be exercised consistently with justice, and with the objects of the act? If it applies, we must remember, to a company where the whole amount on the shares has been paid up, there is no reason why it should not apply to a company where a portion only of the nominal amount registered has been paid up, and the shareholders are liable to contribute for the remainder. Now, it is impossible to contend that a company registered with a nominal capital of 250,000*l.* made up of 25*l.* shares, of which say, only 15*l.* or 20*l.* is paid, should have power to force the registrar to register resolutions reducing their capital to the amount actually paid up. If such a proceeding were permitted, the shareholders' liability would be limited not, as was intended, by the amount of their shares, but by the amount of the already paid-up portion of their shares. Justice, the language of the act, and the intention of the legislature, alike forbid an interpretation which would lead to such a result. I, therefore, think that the nominal capital of this company having been registered at 250,000*l.*, it was not competent to the plaintiffs to reduce that capital. The registrar should not have registered the resolutions making that reduction, and when he was called on to make a further entry which would have affirmed the previous improper reduction of capital, he was justified in declining to make it. The defendant, therefore, is entitled to our judgment.

Bramwell, B., concurred.

Channell, B. I am of the same opinion. The question before us is whether the registrar was bound under the 25 & 26 Vict. c. 89, s. 196, to register a notice of the increase of the decreased capital of this company. That depends on whether he was bound to register the resolution stating the previous reduction of capital. Now it is admitted that a new company formed under that act cannot have a reduction in their capital registered, and I see no reason why an old company coming in to share the privileges of the act should be in a better position than a new company. The short ground of my judgment, therefore, is, that whatever powers to reduce capital this company may have possessed under their original deed of settlement, these powers were lost when the company elected to be registered under the act of 1862 in the manner and under the circumstances stated in the case.

Pigott, B. I am of the same opinion. I think that the powers of reducing capital, whatever they might have been, which were possessed under the original deed of settlement of this company, were lost upon registration.

Judgment for the defendant.

Attorneys for plaintiffs: *T. White & Co.*
Attorney for defendant: *The Solicitor to the Treasury.*

Considered. Mason *v.* Burningham.
[1949] 2 K. B. 545

1867
Nov. 15.

10 Ex 41
CPD. 372
QBD. 178

ROLPH *v.* CROUCH.

Landlord and Tenant—Covenant for Quiet Enjoyment—Measure of Damages—Action against Tenant by person claiming under Landlord—Costs of Defence—Defending without Landlord's express Authority—Authority implied from Conduct.

The defendant demised premises for a term of years to the plaintiff, and covenanted that the plaintiff should occupy the same during the term "without any interruption whatsoever from or by the said defendant, his executors, &c., or any other person or persons lawfully claiming by, from, or under him or them."

An action of trespass was afterwards brought by a person claiming under the defendant against the plaintiff, who gave notice of it to the defendant. The defendant paid no attention to the notice, and the plaintiff, acting on his own judgment and without express authority, defended the action. A verdict was eventually found against him, and he was obliged to pay damages and costs. In an action against the defendant, his landlord, for breach of the covenant for quiet enjoyment contained in the demise:—

Held, that the plaintiff was entitled to recover from the defendant the costs and damages he had paid, and also the expenses he had himself incurred in defending the action of trespass.

Declaration, that by deed dated September 29th, 1865, the defendant demised to the plaintiff, among other premises, a piece of garden ground at the rear of 22, Queen's Road, Bayswater, to hold to the plaintiff, his executors, &c., for the term of seventeen years, at the rent and subject to the covenants therein contained, and the defendant thereby covenanted with the plaintiff, his executors, &c., that the plaintiff, "should and might peaceably and quietly have, hold, use, occupy and enjoy the said premises thereby demised, with their appurtenances, during the term thereby granted, without any interruption whatsoever from or by the said defendant, his executors, &c., or any other person lawfully claiming by, from, or under him or them; and all conditions were fulfilled, &c., necessary to entitle the plaintiff to maintain this action for the breaches hereinafter mentioned; yet, after the demise, and during the term, David Cook, then lawfully claiming the said piece of land through and under the defendant, and having a good title to the same through and under him, entered into the said piece of land and interrupted the plaintiff in the occupation and enjoyment of the said premises, and evicted the plaintiff therefrom, whereby the plaintiff was not only deprived of the possession and beneficial occupation of the said land, but incurred costs and expenses in the defending an action at the suit of the said Cook for the said trespass and eviction, and was forced to pay the costs of the said Cook, who obtained a verdict in the said action, and also the damages awarded by such verdict, and the plaintiff lost money in bringing actions against Cook for the alleged trespass by Cook upon the said piece of garden ground, and also lost the money expended by him in erecting a greenhouse on the land demised, in reliance on the defendant's covenant, and the profits he would have acquired from the same, and was otherwise injured.

Pleas: 1. Non est factum. 2. That Cook did not enter and evict the plaintiff as alleged. 3. That, at the time Cook entered, he had no lawful claim or title to the said premises through or under the defendant as alleged. Issue thereon.

The cause was tried at the London sittings after Trinity Term, 1867, before Kelly, C.B., when it appeared that the plaintiff was tenant to the defendant of premises at No. 21, Queen's Road, Bayswater, for twenty-one years, and also of a piece of garden ground at the back of No. 22 for seventeen years, under a lease dated the 29th of September, 1865, containing the covenant for quiet enjoyment stated above in the declaration. The plaintiff covenanted to pay a rent of 80*l.* per annum for the premises at No. 21, and a peppercorn rent, if demanded, for the piece of garden ground at the back of No. 22. In 1864, the defendant had leased to David Cook "all that messuage or tenement known as No. 23, Queen's Road, with the back garden thereto belonging," and under this demise Cook subsequently claimed the piece of ground at the back of No. 22, stating to the plaintiff that he was able to shew it was, and always had been, a portion of the "back garden" of No. 23. The plaintiff had meanwhile built a conservatory upon and otherwise used the disputed plot of land in his trade, which was that of a greengrocer and florist, and he declined to admit Cook's claim, and thereupon Cook brought an action of trespass against him. Several notices of this action were given by the plaintiff to the now defendant, his landlord, who, however, paid no attention to any of them, and gave no express authority to the plaintiff to defend the action. The plaintiff, nevertheless, defended it, and called the defendant as a witness upon the trial. A verdict was found for Cook, the then plaintiff, for 40*s.* damages. The plaintiff afterwards paid in respect of these damages and Cook's costs 57*l.* 11*s.* 6*d.* His own expenses amounted to 70*l.* These sums he now sought to recover from his landlord in the present action. He also claimed compensation for his expenses in building the conservatory, and for the loss of the piece of land, which, according to his evidence, was worth 10*l.* a year to him. A verdict was found for the plaintiff for 244*l.* 11*s.* 6*d.*, made up of 127*l.* 11*s.* 6*d.* for the costs, damages and expenses of the action, 15*l.* for the conservatory, and 102*l.* for compensation for the loss of the land. The jury also found that the actual reduction of rent to which the plaintiff was entitled, by reason of losing the land, would be 4*l.* per annum. Leave was reserved to the defendant to move to reduce the damages to 1*s.* by striking off the sums of 127*l.* 11*s.* 6*d.*, 15*l.*, and 102*l.*, or any or either of them, or such other sum as the Court might think fit, on the ground that the said sums respectively were not recoverable.

A rule nisi having been obtained accordingly,

Kenealy and *Pearce* showed cause. First, as to the costs, &c. of defending the action of trespass, the plaintiff is entitled to recover. He was justified in defending it, in the absence of express instructions to the contrary, in the expectation that the defendant's covenant for quiet enjoyment was an effectual one, and within the defendant's power to carry out. He could not assume that the defendant, who had made that covenant, would turn out to have no good title: *Williams* v. *Burrell.* (1) In *Smith* v. *Compton,* (2) a similar claim for damages in an action of formedon was held recoverable, although no notice had been given to the landlord of the action. *Blyth* v. *Smith* (3) is an authority that to escape liability the defendant should have absolutely forbidden the plaintiff to defend. Secondly, the value of the land is recoverable according to *Lock* v. *Furze* (4) and the jury have not

(1) 1 C. B. 402.

(2) 3 B. & Ad. 189, 407.

(3) 5 M. & G. 405.

(4) Law Rep. 1 C. P. 441.

given an excessive amount in respect of it. The damages must be such as to place the defendant in exactly the same position, as far as money can do so, as if the defendant had performed his covenant. *Flureau* v. *Thornhill* (1) does not apply to an executed contract, and therefore does not govern this case. Thirdly, as to the conservatory, the expense of erecting it is lost directly through the defendant's breach of covenant, and is its natural consequence.

T. Jones, Q.C., and *Philbrick*, in support of the rule. The plaintiff defended the action brought against him by Cook at his own peril.

[PIGOTT, B. He gave notice to his landlord.]

And the landlord was silent. That would seem almost equivalent to a statement of want of title.

[KELLY, C.B. On the contrary, his silence appears to me to be rather an encouragement to the tenant to use his own judgment, and act for the best.]

In all the cases hitherto decided, there has been either an express authority to the tenant, or else a covenant, as in *Smith* v. *Compton*) (2), to indemnify *against suits* in the lease. Here the covenant is merely for quiet enjoyment. The plaintiff ought to have suffered judgment by default in the action of trespass, and he then might have brought an action against his landlord. The damages of a voluntary defence are not the "necessary" consequences of the defendant's breach: *Walker* v. *Hatton* (3); *Pow* v. *Davis*. (4) Secondly, the jury have given, not the value of the land only, but the possible profit which the plaintiff might have made out of it. The damages should, at all events, have been limited to the reduction of rent which the plaintiff might be entitled to. *Lock* v. *Furze* (5) is not applicable. This strip of ground was really a gift. It was held at a peppercorn rent. Thirdly, as to the cost of the conservatory, that is not the natural consequence of the defendant's breach, and could not have been within the contemplation of the parties, according to the principles laid down in *Hadley* v. *Baxendale*. (6)

KELLY, C.B. I think this case is free from difficulty. The first question is, as to the right of the plaintiff to recover damages, costs and expenses, incurred by him in defending an action of trespass brought against him by one Cook, who claimed under his landlord, the now defendant. In order to ascertain if the plaintiff is entitled to recover, we must look to the covenant in the lease under which he held the premises, which is as follows: "Newton Crouch doth hereby for himself, his heirs, &c., covenant with Joseph Rolph, his executors, &c., that he the said Joseph Rolph, his executors, &c., paying the rent hereby reserved, and performing the covenants hereinbefore contained, shall and may peaceably and quietly have, hold, use, occupy and enjoy, the premises hereby demised, with their appurtenances, during the term hereby granted, without any interruption whatsoever from and by the said Newton Crouch, or his executors, &c., or any other person or persons lawfully claiming by, from, or under him or them." Now, Cook being a person claiming under the defendant, this covenant secures the plaintiff from interruption by Cook. Then we have next to inquire whether the conduct of Cook caused a breach of this covenant. What occurred was, shortly, this: Cook came to the plaintiff, and told him that he had no right or title in the premises, and no power to deal with them in any way; and because the plaintiff had, in fact, dealt with them, Cook commenced an action of trespass against him. The plaintiff set up the best defence he could to the action, but in the result the verdict was against him, and he became liable for the damages and costs of the action. It is contended, that although this conduct on the part of Cook may constitute an interruption to the plaintiff's enjoyment, and therefore may be a breach of the covenant in the lease, yet the now plaintiff had no right to defend the action brought against him by Cook, and to incur the costs he did incur. But, applying our common sense to the matter, how does it stand? The plaintiff was in possession of the premises under a lease containing the defendant's covenant. Then Cook, claiming under the defendant, interrupts his enjoyment. What course was the plaintiff to adopt? He had himself no knowledge whether there was a good title in his landlord, the now defendant, or not. The defendant alone knew that. That being so, the plaintiff gave the defendant notice that the action had been brought, and by that notice, in effect, requested the defendant's direction as to how to act. The defendant, however, remained silent, and left the plaintiff to do as he might think fit. I think it was the defendant's duty to have communicated with the plaintiff, and either to have said, "I have a good title," or else, "I made the lease to you under a mistake. I have no title; you had better not defend the action." The defendant, however, failed to perform that duty, and the plaintiff, accordingly, being left to himself, acted for the best, upon his own judgment. He acted bonâ fide, and, giving credence to the defendant's warranty that he should quietly enjoy the property. Afterwards, on the trial of the action, it turned out that the defendant, as he must be taken to have known before, had no title to give such a warranty. Under these circumstances, I am of opinion that the plaintiff was justified in the course which he took, and therefore that the damages, costs and expenses which he incurred in the action brought against him by Cook, are the natural and immediate consequence of the defendant's breach of covenant.

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(1) 2 Wm. Bl. 1078.
(2) 3 B. & Ad. 189, at p. 191.
(3) 10 M. & W. 249.
(4) 1 B. & S. 220; 30 L. J. (Q. B.) 257. Jur. N.S. 1010
(5) Law Rep. 1 C. P. 441.
(6) 9 Ex. 341; 23 L. J. (Ex.) 179. 18 Jur. 358

Secondly, with regard to the sum of 102*l.* given for compensation for the loss of the land. It appears that the plaintiff had taken a lease of seventeen years from the defendant, with a covenant for quiet enjoyment during the term. The land which was leased has been taken away from him, and he has lost what it was and might reasonably have been expected to be worth to him. According to his own evidence, the land was worth 10*l.* a year, and there seems no reason to doubt that he had made a fair estimate of the loss he had sustained, and that being so, the amount given him by the jury is, in my opinion, not excessive. Then, lastly, as to the conservatory. The plaintiff, relying on the performance by the defendant of his covenant, erected it for the better and more conveniently carrying on of his trade as a florist. He has lost the use of it, and I think that he is entitled to the sum given him by the jury for that loss. This rule, therefore, must be discharged.

BRAMWELL, B., concurred.

CHANNELL, B. I am of the same opinion, though I cannot say I

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consider the question as to the right to recover the costs incurred in the defence of the action of trespass brought against him by Cook so free from doubt as it appears to the Lord Chief Baron. If the defendant had authorized in express terms the defending the action by the plaintiff, no doubt the plaintiff might recover. And, upon the whole, looking at the fact that the defendant had notice of the action having been brought, and did not suggest to the plaintiff not to defend it, and that he, and not the plaintiff, alone knew whether or not he really had title, I think there was evidence that he sanctioned the defence to the action. As to the other heads of damage, something has been said about the piece of land in question being let at a peppercorn rent, but I think we must take it that, though the rents were separated in the lease, the house and the piece of land were let together, and the value of the latter considered in the rent paid for the former. The transaction was, in fact, one bargain, though separate rents were reserved. Under these circumstances, I do not think the jury acted incorrectly. Their verdict, therefore, upon the value of the land, and the cost of the conservatory, ought not to be disturbed.

PIGOTT, B. I am of the same opinion, although I share my brother Channell's doubts as to the plaintiff's right to recover the damages, costs and expenses incurred by him in defending the action brought against him by Cook.

Rule discharged.

Attorney for plaintiff: *Edward Clarke.*
Attorneys for defendant: *Chauntler & Crouch*

SMITH AND OTHERS *v.* MERCER AND OTHERS.

1867

Nov. 20.

4 Ex 270
8 Q 508

Sale of Goods—Payment by "approved" Bill—Vendor's Right to have recourse to Purchaser on dishonour of Bill—Duty of Vendor—Notice of dishonour—Purchaser not a party to Bill.

The plaintiffs sold to the defendants goods to be paid for, according to the contract between the parties, by cash or "approved banker's bills." The defendants paid for them by an "approved banker's bill," which was dishonoured on presentment for acceptance. They were not parties to the bill, and received no notice of dishonour. In an action against them at the suit of the plaintiffs for the price of the goods:—

Held, that the defendants' liability was not more extensive than it would have been if they had indorsed the bill, and that they were therefore discharged, not having received due notice of dishonour.

SPECIAL CASE.

The plaintiffs are merchants at Liverpool, and the defendants cotton spinners at Clitheroe. On the 9th of February, 1866, the plaintiffs sold, through Messrs. Curry and Co., cotton brokers, fifty bales of cotton to the defendants. The mode of payment prescribed by the invoice sent with the goods was "payment within ten days, by cash or by approved banker's bills, not exceeding three months' date, to be made equal to cash in ten days and three months from the day of sale." A few days after the sale the defendants remitted to Curry & Co. sufficient cash to pay for the goods. On receiving it, Curry & Co. paid it in to Barned's Banking Company, and on the 20th of February obtained a bill of exchange, payable eighty-eight days after date, for the invoice price of the cotton (1222*l.* 2*s.*), drawn by Barned's Banking Company on Messrs. Prescott, Grote, Cave, & Co., of London. This bill, to which the defendants were not parties, was indorsed by Curry & Co. to the plaintiffs, and was delivered to them on the same day on which it was received from the bank. The plaintiffs thereupon gave a receipt "for the sum of 1222*l.* 2*s.*, being payment of fifty bales cotton sold 9th inst."

On the 24th of February the plaintiffs indorsed the bill to certain persons, who took it for value in the ordinary course of business. Barned's Banking Company failed on the 19th of April following, and on the 23rd the holders of the bill presented it for acceptance to Messrs. Prescott, Grote, Cave, & Co., who declined to accept it. It was admitted, that had the bill been presented before the failure of Barned's Banking Company, it would have been duly accepted.

Due notice of dishonour was given by the holders to the plaintiffs, and by them to Curry & Co. and Barned's Banking Company. The bill not having been taken up, the plaintiffs, by a letter, dated the 9th of May, communicated the fact to the defendants and applied for payment of the cotton. This letter was the first intimation received by the defendants that the plaintiffs had not been paid in cash by Curry & Co. for the cotton. The bill which was substituted for cash was sent to the plaintiffs without their knowledge or sanction, but of this the plaintiffs were not aware. Barned's Banking Company were bankers in good credit when the plaintiffs took the bill, and the bill was an "approved" banker's bill.

The question for the opinion of the Court, which is to have power to draw inferences of fact, is, whether the plaintiffs are entitled to recover from the defendants the price of the cotton?

Crompton Hutton for the plaintiffs. The bill is found to have been an "approved banker's bill," and therefore one which the plaintiffs were bound to take according to the terms of the contract. But they did not, by so doing, discharge the defendants. They had a right to look for cash, or what could be turned into cash. It turned out that the "approved bill" was worthless, and therefore they are entitled to have recourse to the defendants. But then it will be said there was laches, first in not presenting the bill for acceptance earlier, and secondly, in not giving the defendants notice of dishonour. As to the first point, the bill was payable not at sight, but at a certain period after date, and there was no laches in not presenting it before it became due. As to the second, the defendants were not parties to the bill, and not entitled to notice at all. The day after the dishonour of the bill, an action for goods sold and delivered might have been commenced against them.

[THE COURT referred to *Camidge* v. *Allenby.* (1)].

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(1) 6 B. & C. 373.

That case, like *Strong* v. *Hart* (1), is distinguishable on the ground that there the plaintiff voluntarily took the bill. Here the plaintiffs had no choice.

Quain, Q.C. (*Baylis* with him), contrà. The bill was payment, and in the receipt it is stated to have been so received.

[THE COURT intimated that the terms of the receipt could not be relied on.]

It was to be an approved banker's bill, i.e., a bill which the vendors might or might not approve. They did approve this bill, and thereby exercised an option.

[PIGOTT, B. In Smith's Mercantile Law, 7th ed. p. 507, an "approved" bill is said to be a bill to which no reasonable objection can be taken.]

The plaintiffs were at all events not bound to take any bill. They might have objected to this one, if they had thought fit.

[BRAMWELL, B. It appears to me that the plaintiffs might, before taking this bill, have insisted on the defendants' indorsing it. They did not take that precaution, but that being so, can they be held to have taken the bill in discharge of the price of the cotton ?]

Assuming that they cannot, and that recourse might still be had to the defendants, the plaintiffs by their laches lost the power to recur to them. They were bound to give notice of dishonour to the defendants, who were liable, if at all, only in the same manner as if they had indorsed the bill. [He was stopped.]

C. Hutton, in reply.

KELLY, C.B. The plaintiffs in this case were the vendors of certain cotton to the defendants, and were to be paid for it, according to the contract, "within ten days, by cash or by approved banker's bills, not exceeding three months' date, to be made equal to cash in ten days and three months from the day of sale." The defendants remitted cash to their brokers, who, however, did not remit it to the vendors, but instead paid them by a banker's bill drawn by Barned's Banking Company on Messrs. Prescott, Grote, Cave, & Co., of London. The circumstance of a bill being given instead of cash is not material. The brokers were the defendants'

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(1) 6 B. & C. 160.

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agents, and the defendants were bound by their act. Then the bill having been received by the plaintiffs, the question arises, whether it was an "approved" bill or not. The case finds that it was, and by that finding we must understand that it was a banker's bill to which no reasonable mercantile objection could be made. On receipt of the bill the plaintiffs did not immediately present it for acceptance to the London bankers to whom it was addressed, but endorsed and circulated it. It might be contended, I think, that by this conduct the plaintiffs made it their own. The fact of the holder being able to present it to the London bank was an element which went to make it an "approved bill," and it may well be that the plaintiffs having accepted it and then having failed to present it, made it their own, and upon its becoming valueless were precluded from having recourse to the defendants. It is, however, unnecessary to decide this point on the present occasion.

The next fact to be noticed is the failure of Barned's Bank, which took place some two months after the plaintiffs had received the bill. Then at length the plaintiffs take, or cause to be taken, measures for the presentment of the bill for acceptance. It was presented but was dishonoured. Upon this the holders of the bill were bound to give notice of dishonour to all parties to it, and this appears to have been done. But in this action they are seeking a remedy against the defendants, who were not parties to it, and who had had no notice of dishonour. This directly raises the question, whether under such circumstances recourse can be had to the defendants? I am of opinion that it cannot; and although it may be that the plaintiffs had no option but to take the bill in the first instance, it being an "approved" bill and according to the terms of the contract, I think their right to proceed against the defendants was conditional on their giving the defendants notice of the dishonour of the bill. Both on principle and authority, if the plaintiffs meant to have recourse to the defendants they should have given them notice, upon finding the bill was dishonoured. Our judgment, therefore, must be for the defendants.

BRAMWELL, B. I am of the same opinion. Looking at the words of the contract only, there has been no default on the part of the defendants. They have done as they were entitled to do under the contract: they have paid by an "approved" bill. But then the plaintiffs in effect say that mercantile understanding often attaches obligations to parties which are not expressed in words. In this case I think there was such an obligation to this extent—that the plaintiffs might, if they had chosen, have insisted on the defendants indorsing the bill. They did not so insist, but in my judgment the defendants' liability continues just as though they had. They are liable in the same manner, and with the same incidents as if they had been called on, as they might have been, to indorse the bill. But they are not liable otherwise, and therefore not liable without a notice of dishonour being given to them. The plaintiffs failed to give that notice, and therefore are not entitled to recover. In short, they seem to me in this dilemma: either they took the bill out-and-out, for better for worse, in which case the defendants are not liable at all, or else they took it with power of having recourse to the defendants, but only as if the defendants had indorsed it, and in that case, the defendants, being without notice of dishonour, could not be made liable. My judgment, on principle, is accordingly for the defendants, and the authorities are to the same effect.

PIGOTT, B. I am of the same opinion on the same grounds. Either the defendants paid for the goods out-and-out by the bill, or else remained liable, as though they were actual parties to it. In the former case they were never liable at all; in the latter they have ceased to be liable because they received no notice of the dishonour of the bill.

Judgment for the defendants.

Attorneys for plaintiffs: *Wright & Venn.*
Attorneys for defendants: *Johnson & Weatheralls.*

NOTE.—The case of *Swinyard* v. *Bowes*, 5 M. & S. 62, was not cited during the argument. It may, however, be remarked that in that case there was no pre-appointed mode of payment. See also *Van Wart* v. *Woolley*, 3 B. & C. 439.

END OF MICHAELMAS TERM, 1867.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXI VICTORIA.

1868 Jan. 11.

Ex parte ARNISON AND OTHERS.

Tithe Rent-charge—What is a "sufficient distress"—Growing Crops—Tithe Owner's Duty—Unenclosed Land—Costs of keeping possession—6 & 7 Will. 4, *c.* 71, *s.* 82—57 *Geo.* 3, *c.* 93, *s.* 1.

The 6 & 7 Will. 4, c. 71, s. 82, provides a remedy, in addition to the remedy by distress, for the recovery of tithe rent-charge "in case the said rent-charge shall be in arrear and unpaid for the space of *forty days* next after any half-yearly day of payment, and there shall be no *sufficient distress* on the premises liable to the payment thereof":—

Held, that a tithe owner, in estimating whether or not there was a sufficient distress on premises distrained on by him, was bound to include the prospective value of growing crops, although not capable of actual realisation within forty days from the day on which the rent-charge was in arrear.

The 57 Geo. 3, c. 93, s. 1, enacts that no person making any distress for rent where the sum due shall not exceed 20*l.*, shall be allowed any other or more charges than those mentioned in the schedule to the act. Among the charges in the schedule is, "Man in possession," 2*s.* 6*d.* a day:—

Held, that such a charge was excessive for retaining possession of growing crops distrained upon for a tithe rent-charge less than 20*l.* in amount, on a piece of unenclosed meadow land.

1868

Ex parte ARNISON.

THIS was a rule obtained by Nathan Arnison and others, calling on the Rev. John Heysham to show cause why the writ issued by him under the 82nd section of the 6 & 7 Will. 4, c. 71, and the order by virtue of which it was issued, and all subsequent proceedings, should not be set aside on the grounds (amongst others) that he had no right under the circumstances of the case to abandon the distress made by him under the 6 & 7 Will. 4, c. 71, s. 81, and to adopt proceedings under s. 82 of that act; and that there was a sufficient distress upon the premises liable to the payment of the tithe rent-charge claimed by him.

The 6 & 7 Will. 4, c. 71, s. 81, enacts that in case a tithe rent-charge "shall at any time be in arrear, and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years, provided that not more than two years' arrears shall at any time be recoverable by distress." Section 82 enacts that in case the said rent-charge shall be in arrear and unpaid for the space of *forty days* next after any half-yearly day of payment, and there shall be *no sufficient distress* on the premises liable to the payment thereof, it shall be lawful for any judge of a court of record at Westminster upon affidavit of the facts, to order a writ to be issued directed to the sheriff of the county in which the lands chargeable with the rent-charge are situated, requiring the said sheriff to summon a jury to assess the arrears of rent-charge remaining unpaid, and to return the inquisition thereupon taken to some one of the courts of law at Westminster on a day therein to be named; a copy of which writ and notice of the time and place of executing the same shall be given to the owner of the land ten days previous to the execution thereof; and the sheriff is hereby required to execute such writ according to the exigency thereof;

and the costs of such inquisition shall be taxed by the proper officer of the court; and thereupon the owner of the rent-charge may sue out a writ of *habere facias possessionem,* directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable therewith until the arrears of rent-charge found to be due, and the said costs, and also the costs of such writ, and of executing the same, and of cultivating and *keeping possession* of the lands, shall be fully satisfied: provided always that not more than two years' arrears over and above the time of such possession shall be at any time recoverable.

The 57 Geo. 3, c. 93, s. 1, enacts that no person making any distress for rent, where the sum due shall not exceed 20*l.*, shall be allowed to take any other or more charges than those mentioned in the schedule to the act. Among the charges in the schedule is, "Man in possession," 2*s.* 6*d.* a day.

The facts of the case, as they appeared from the affidavits, were as follows:—The Rev. John Heysham is the owner of a tithe rent-charge of 5*s.* 1*d.* per annum, apportioned on a certain piece of unenclosed land in the tithe apportionment of the township of Plympton Wall, in the parish of Lazonby, Westmoreland, in the occupation of James Hesketh, and seven other persons, as tenants to Nathan Arnison and others, who are the owners of it. On the 30th of May, 1867, the tithe rent-charge having then been for some years in arrear, notices were sent in registered letters to each of the occupiers that Mr. Heysham intended to distrain for 10*s.* 2*d.*, being two years' arrears, and on the 12th of June following he issued a distress warrant to his bailiff to levy the amount due. Upon entering the land the bailiff found that there was nothing available on it except a growing crop of grass. The value of the crop, after deducting the cost of winning it, would have been about 3*l.* Mr. Heysham's claim, had the distress been carried out, would have amounted to 2*l.* 15*s.* 11½*d.* (a sum made up of 10*s.* 2*d.*, the rent-charge due, and the costs of the eight notices to the tenants of the levy, &c.), exclusive of the cost of retaining possession from the day of entry until the crop was ripe, which it would have been in about six weeks. This item, estimated at the rate prescribed by the

57 Geo. 3, c. 93, s. 1 (2*s.* 6*d.* a day), would have been 5*l.* 5*s.* The total, therefore, due to the tithe owner would, according to the bailiff's calculations, have been 8*l.* 0*s.* 11½*d.*, an amount which, under the most favourable conditions, the growing crop would have been unequal to satisfy. It would not, moreover, have been capable of actual realisation within forty days from the day on which the rent-charge was in arrear. Under these circumstances the bailiff withdrew, and Mr. Heysham commenced proceedings under 6 & 7 Will. 4, c. 71, s. 82, by obtaining an order from Channell, B., for the issue of a writ of *hab. fac. poss.*, on an affidavit that the rent-charge was more than forty days in arrear, and that there was "no sufficient distress" on the premises. This writ and order the owners of the land now sought to set aside. They contended that, even assuming all the items which made up the 2*l.* 15*s.* 11½*d.* to be legally recoverable, there was still a "sufficient distress" on the premises, inasmuch as they denied Mr. Heysham's right to charge 2*s.* 6*d.* a day for a "man in possession," the land being a piece of unenclosed meadow. [The ground on which the judgment of the Court proceeded renders it unnecessary to specify the objections raised to the various items in the total of 2*l.* 15*s.* 11½*d.*]

T. Jones, Q.C., and *C. Hutton*, shewed cause. First, the tithe owner was not bound to include the value of the growing crop at all. In estimating whether or not there is a "sufficient distress" under 6 & 7 Will. 4, ss. 81, 82, no account need be taken of any thing which can not be realised within forty days from the day on which the rent-charge was in arrear: *Newnham* v. *Bever.* (1)

[MARTIN, B. The act seems to me to contemplate growing crops as well as goods and chattels.]

No doubt the landlord might, if he pleased, include growing crops, but he is not *bound* to include anything not distrainable *in præsenti.* The words in s. 82 are the same as those used in 4 Geo. 2, c. 28, s. 2, which refer only to goods which could be distrained at once. *Doe* d. *Haverson* v. *Franks.* (2)

[CHANNELL, B. Certainly it would seem to be open to some doubt whether the tithe owner is not entitled to actual payment at the end of forty days, and whether he is to take into

(1) 8 C. B. 560. (2) 2 C. & K. 678.

account anything which is incapable of being realised within that period.]

Secondly, the crops did not constitute a "sufficient distress." The charge for keeping possession was justifiable. A sale before the crop was ripe would have been void, *Owen* v. *Legh* (1), and unless *actual* possession be kept in such cases as this, the occupying tenants might at any time come and take away the crops. See per Parke, B., in *Piggot* v. *Birtles.* (2)

[Martin, B. The observations of Parke, B., do not apply here. It cannot be that a distrainor of growing crops on a piece of unenclosed land is entitled, as a matter of course, to charge 2*s.* 6*d.* a day until the crop ripens, for a " man in possession."]

The possession must be continuous and actual.

Manisty, Q.C., and *H. Tindal Atkinson,* in support of the rule, were not called upon.

Kelly, C.B. I think that this rule ought to be made absolute. The question to be decided is whether, under the circumstances stated in the affidavits, there was any "sufficient distress" on these premises to satisfy the rent-charge due. Now, it seems that there was nothing on them besides a growing crop of hay, which would be ready for cutting at some future period, and if this crop, after deducting the expenses of cutting it, &c., was sufficient to meet the amount due, then there would be (assuming the crop to be distrainable) a sufficient distress upon the premises, but not otherwise. Upon the point whether the crop would or would not be sufficient, the result of the affidavits is, that we may take 3*l.* to be the sum which the hay might reasonably be expected to realise. Then we have to see if that would be enough to satisfy the claim made; and granting all the items claimed to be justifiable, we find in the aggregate that they came to 2*l.* 15*s.* 11½*d.*, a sum falling short by some few shillings of the 3*l.*, the value reasonably to be expected from the hay. Thus, therefore, upon the affidavits it seems clear that, even assuming all the distrainor's charges to be legal, there was a "sufficient distress." It is doubtful whether some of the items are capable of justification; and I must say, with regard to the notices served on each of the eight tenants, that this

(1) 3 B. & A. 470.

(2) 1 M. & W. 441, at p. 450.

Court must not be supposed to sanction either such a charge as is made for each notice (2*s.* 6*d.* each), or the charge for mileage, and the other expenses entered as incident to giving those notices. However, taking everything in favour of the distrainor, the rule must still be made absolute, inasmuch as the total of the items he claims does not amount to the value of the growing crop.

Then, as to the charge for retaining possession: in my opinion the distrainor under the circumstances of this case is not entitled to make any charge whatever, unless it be some trifling sum, such as for putting up a notice board, for example, to notify that the land was in the custody of the law, or for taking any other step whereby he might reasonably assert his possession of the land. It is unnecessary to enter into a general argument as to the manner in which possession of growing crops may be taken. The manner in one case may vary from the manner in another. But where we are dealing with a piece of land of the sort described in this case, it is contrary to common sense to say that a person is to take possession for nearly two months, charging all that time at the rate of 2*s.* 6*d.* a day. After possession had once been taken, the only expense of retaining it which we could reasonably allow, would be that of putting up a public notice, or the adoption of some similar precaution. And I think the few shillings left undisposed of out of the 3*l.* would amply suffice to meet that expense.

A further point has been made that the tithe owner was not bound to distrain growing crops at all. But I am clearly of opinion that under s. 81 of the 6 & 7 Will. 4, c. 71, they should be estimated in calculating the value of the goods distrainable. There is no reason to suppose that the legislature meant to except them. Frequently they form the only property (as they actually did here) out of which tithe could have been claimed, and upon which a distress to recover the rent-charge, which has replaced the tithe, can be levied. This rule must, therefore, be made absolute.

MARTIN, B. I am of the same opinion; and the short ground on which I base my judgment is, that the tithe owner has not made out that no "sufficient distress" was to be found on the premises. As to the charge of 2*s.* 6*d.* a day for a man in possession, I do not think that in such a case as this it can be made.

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The 57 Geo. 3, c. 93, does not, in my judgment, apply under the circumstances we are dealing with here, and that being so, we have to consider whether the charge is "reasonable." Now I do not think we could possibly hold expenses sixteen times as great as the amount distrained for to be reasonable. Yet, adopting the claim made for a "man in possession," that is what the expenses in this case amount to. I, therefore, think that the rule should be made absolute.

CHANNELL, B. I also think that the rule should be made absolute. I should have added nothing to what has fallen from the Lord Chief Baron, had it not been that I wish to explain a doubt I expressed during the argument as to whether under ss. 81, 82 of the 6 & 7 Will. 4, c. 71, growing crops were distrainable. That doubt, however, I am now convinced ought not to prevail. The words of the sections are very large, and, giving them an ordinary construction, would unquestionably authorize growing crops to be distrained. My only doubt was, whether the act did not intend that at the end of forty days from the time the rent-charge was in arrear, the tithe owner should have actual payment, or a power of resorting to his remedy by action. But I believe that the policy of the legislature in passing the act, was not to encourage the bringing of actions, but to give the tithe owner another remedy, namely, by levying a distress. That was made his primary and principal remedy; and before he can pursue any other he must satisfy the Court that he can find no "sufficient distress" on the land. Now, looking at these affidavits, which, I may observe, were plainly prepared with no reference whatever to this point, they shew that there was a sufficient distress, and the distrainor, therefore, is not entitled to pursue his remedy by issuing his writ of *hab. fac. poss.* I have added these words simply to remove any doubt as to my opinion on the power to distrain growing crops. I think that they may be distrained, and that the tithe owner is bound to include their value in coming to a conclusion as to the sufficiency of the distress he finds on the premises, although possibly not capable of being actually realised within forty days.

PIGOTT, B. I am of the same opinion. On the question whether growing crops are distrainable, I agree with what has been said by my Brother Channell; and as to there being a "sufficient distress," I agree with the rest of the Court. It is clear from the affidavits that there was.

Rule absolute.

Attorneys for the tithe owners: *Gray, Johnston, & Mounsey.*
Attorneys for the land owners: *Jones & Morris.*

Jan. 23.

WILSON AND OTHERS *v.* FORD AND ANOTHER, EXECUTORS.

Husband and Wife—Desertion—What are "Necessaries" for the Wife—Costs of Suit for Restitution—Expenses of Professional Advice—Counsel's Opinion—Attorney's Bill.

The legal expenses incurred by a deserted wife, (1), preliminary and incidental to a suit for restitution of conjugal rights, (2), in obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement, (3), in obtaining professional advice as to the proper mode (a) of dealing with tradespeople, who were pressing her to pay them for various necessary articles supplied to her since she had been deserted, and also (b) of preventing a distress threatened on furniture belonging to her husband in the house she occupied, are necessaries for which she has implied authority to pledge his credit during his lifetime, and for which, after his death, his executors are therefore liable.

DECLARATION by the plaintiffs against the defendants as executors of Frederick Ford, deceased, for money payable for work done and attendances given by the plaintiffs as the attorneys of the said Frederick Ford in his lifetime.

Pleas: 1. Except as to 70*l.*, never indebted. 2. As to the said 70*l.*, payment into Court.

Replications, joining issue on the 1st plea, and accepting the sum paid into Court under the 2nd.

This action was brought by a firm of attorneys to recover remuneration from the executors of Frederick Ford, for work done and attendances given by them to his wife after he had deserted her.

At the trial before Pigott, B., at the sittings in Middlesex during Hilary Term, 1868, the following facts were proved:—On the 18th of September, 1866, Frederick Ford married. The parties lived together until the 11th of December, 1866, when Ford deserted his wife, leaving her residing alone in the house which he had occupied with her during the coverture. After being deserted, Mrs. Ford consulted her attorneys (the plaintiffs) as to the best means to adopt to obtain her husband's return. They eventually, after vainly endeavouring to induce him to return by other means, recommended the institution of a suit for restitution of conjugal rights. A citation was issued, in accordance with their advice, on the 4th of January, 1867, and subsequently a decree for alimony pendente lite was made. Before the suit came to a hearing the husband died, and no decree, therefore, was ever pronounced. One item in the plaintiffs' bill was for the taxed costs of and for the expenses preliminary to this suit.

Previous to the marriage Ford had made a verbal agreement with his wife to settle her own property upon her, but no settlement was afterwards executed. At one of the consultations with counsel, held whilst the suit was in progress, it was suggested that specific performance might, perhaps, be obtained of this verbal agreement for a settlement. The plaintiffs took the opinion of an equity counsel on the matter, and a second item of their bill was for the expenses incurred incidental to obtaining this opinion, and the fee for the opinion itself.

After Mrs. Ford had been deserted, several tradesmen, who had from time to time supplied her with necessaries, demanded payment from her. She consulted the plaintiffs as to the proper course to adopt with respect to these claims. They advised her on the subject, and communicated with the tradesmen, referring them to Ford for payment. They also wrote to Ford's attorney, to inform him of the demands which had been made on Mrs. Ford, and, in the result, Ford paid what was due. A third item of their bill consisted of charges made relating to the work done by them with reference to these tradesmen's bills.

A fourth item was for the expenses of preventing a distress being made by the landlord for rent in arrear, on the furniture of the house occupied by Mrs. Ford. The plaintiffs gave notice of the landlord's intention to distrain to the husband's attorney. The rent was in consequence paid, and the furniture, which belonged to the husband, saved.

The plaintiffs' whole bill amounted to 99*l.*, which they now sought to recover from the executors of Frederick Ford. The jury found a verdict for 17*l.* beyond the sum paid into Court. Leave was reserved to move to enter a verdict for the defendants, on the ground that none of the items of the plaintiffs' bill, or, at all events, none of the items, except the taxed costs of the suit for restitution, were recoverable. The money paid into Court more than covered those costs.

January 23. *Lopes* moved, pursuant to the leave reserved. None of the items are recoverable. A wife has no implied authority to pledge her husband's credit for anything beyond expenses incurred, whether by legal proceedings or otherwise, to secure her against actual personal violence: *Brown* v. *Ackroyd.* (1) In this case it cannot be said that the suit in the Divorce Court was "necessary" for that purpose.

[PIGOTT, B. It was the only mode of obtaining alimony.]

The wife was not justified in obtaining the means of living in that manner. She could pledge her husband's credit for necessaries, but not for the legal expenses of obtaining a fixed provision for herself. In *Ladd* v. *Lynn* (2), the expenses of preparing a deed of separation were held not to be necessary to the wife, and there Lord Abinger, C.B., says (3): "The rule as to necessaries, for which a husband is liable, means such things as are necessary for the sustenance or protection of the wife."

[KELLY, C.B. This case is very different from one in which a deed of separation is voluntarily assented to by both husband and wife.]

Secondly. Assuming the actual taxed costs are recoverable, the remaining items are not. It cannot be that a wife can charge her husband with the cost of obtaining a legal opinion on an antenuptial agreement. Then as to the items relative to the tradesmen's bills and distress, Mrs. Ford was not justified in getting legal advice. The tradesmen should have been left to their proper remedy against the husband, and the distress have been allowed to take its course.

KELLY, C.B. I am of opinion that there should be no rule in this case. There does not appear to be any direct authority to the effect that a wife is not entitled to take legal measures, in order to procure subsistence and a restitution of conjugal rights, in case her husband has deserted her, and we have therefore to consider the point upon principle alone. Now, here the husband, having possessed himself of all his wife's property, deserts her without notice; leaving her in the house in which she had been living with him, unprovided with money or the means of subsistence. Under these circumstances, the question suggests itself to our common sense, what was the deserted wife to do? The most obvious step she could take was to procure, if possible, the return of her husband. She attempted to do so by letters, and by every means in her power. All was in vain. He never returned, and then she took the only step which was left open to her. She instituted legal proceedings to compel his return; proceedings for a restitution of conjugal rights. It became necessary for her, in order to institute the suit, to consult her attorneys, and I am of opinion that the costs and all reasonable expenses so incurred, preliminary to the institution of the suit, as well as the expenses of the suit itself, were "necessaries" for her, and were incurred by her properly and for a lawful purpose.

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(1) 5 E. & B. 819. (2) 2 M. & W. 265. (3) 2 M. & W. at p. 267.

2 Jur NS 283

Next, with regard to the second item, it appears that before Mrs. Ford's marriage a verbal arrangement for a settlement had been made, but no actual settlement had ever been executed. Here again the question naturally arises, what course could she properly adopt to obtain her subsistence after desertion? One mode of proceeding was by the institution of the suit for restitution; but it was suggested at a consultation held in reference to that suit, that the settlement might perhaps be capable of legal enforcement. She could not be expected to know herself what the effect of the verbal arrangement was, and accordingly she consulted her attorneys. They, being themselves doubtful on the matter, laid it before counsel, and it is the expense of obtaining counsel's opinion which is objected to. But I think the expense was in every way necessary to her. It was incurred in order that she might ascertain whether or not she was entitled, under the settlement, to any money which she could apply to her own maintenance after desertion.

Then, as to the expenses incurred in reference to the tradesmen's bills, there is more doubt, because the law being well settled that for necessaries supplied to a wife the husband is liable, it might be said that she ought to have left the tradesmen who were pressing her to apply to him. Still, we must remember that, when a husband deserts his wife, he makes her for many purposes his agent, and confers on her an implied authority to do all that is necessary and lawful towards obtaining the means of subsistence. And in my judgment it was a proper course for the wife to take to consult her attorneys before allowing the tradesmen to sue her personally. She might have been, I may observe, liable herself for some of the articles supplied, in a court of equity, had she been possessed of any separate estate, and it was not unnatural or improper for her to consult her attorneys in respect of these bills. They communicated with the husband's legal adviser, and in the event the husband paid what was owing. The cost of consulting them, and their subsequent attendances on the tradesmen, are therefore, in my opinion, expenses reasonably incident to her condition and circumstances.

The point raised as to the sum charged for advice on the distress hardly bears an argument. Here was a wife left by her husband, in a house fitted with his furniture. The landlord threatened a distress; and I think it was really a duty she owed to him to do her utmost to protect his goods. She went to her attorneys for advice as to the right course to adopt, and their charges in the matter are, I consider, necessary expenses. Upon all the points raised, therefore, I decide in favour of the plaintiffs, who I think were entitled to recover the whole of the items claimed from the husband's executors.

CHANNELL, B. I am also of opinion that there should be no rule. The money paid into Court covers the amount of the taxed costs of the suit; but the defendants are, nevertheless, not precluded from contesting their liability. I think, however, that the expenses incurred were necessaries in the sense that the wife may say that she had an implied authority to pledge her husband's credit in respect of them. What would have been the termination of the suit, we cannot tell, for the husband died during

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its progress. But the wife was entitled to alimony pendente lite. Now, in the case of *Brown* v. *Ackroyd* (1), the Chief Justice (2) places the decision of the Court on the ground that the expenses there incurred were to protect the wife from actual violence; and the other learned judges decided on a similar ground. But that circumstance by no means satisfies me that many other expenses might not be "necessary" to a deserted wife; and I think, that where a suit was instituted, as it was here, for restitution of conjugal rights, and for alimony pendente lite, the expenses in relation to it were necessary to her as wife, and such as she was justified in incurring. Therefore, I am of opinion that the taxed costs are recoverable against the husband's executors.

With regard to the other items there is more doubt; but still not enough to induce me to differ from the Lord Chief Baron. The distress was on the husband's goods, and his wife having been deserted by him, was justified in finding out whether they were legally liable to the distress or not; and her law expenses incurred with that view were, in my opinion, necessaries to her. Then, as to the tradesmen's bills, to which the husband afterwards admitted he was liable, by paying them, I think she was right in taking legal advice about them. Lastly, I consider the claim made in respect to the opinion taken on the verbal arrangement for a settlement, with the object of discovering whether or not specific performance of it could be had, was also a proper one. The plaintiffs, therefore, are entitled to retain their verdict.

PIGOTT, B. I am of the same opinion. The husband in this case had left his wife without notice, and without a penny to live upon. She and her attorneys did their best to make him come to some arrangement, but he refused to listen to them. As a last resort, her attorneys advised her to go to the Divorce Court, and institute a suit for restitution of conjugal rights. Then the question is, whether the expenses preliminary to, and incurred in, the course of this suit, were necessaries for which she could pledge her husband's credit? Now, the word "necessary" is a relative term, and, in considering whether or not these expenses are neces-

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(1) 5 E. & B. 819.
2 Jur NS 283

(2) 5 E. & B. at p. 825.
2 Jur NS 284

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saries, we must recollect that she did the best she could. The cause was terminated by the husband's death, and we have to decide if the attorneys are to lose their costs. I am clearly of opinion, under the circumstances of this case, that they are entitled to recover them from the executors of the husband.

Whether the expense of consulting counsel on the effect of the verbal arrangement for a settlement, is recoverable, is more debatable; but, upon the whole, I think it was necessarily incurred. The step was taken in consequence of a suggestion at a consultation, during the preliminary proceedings in the divorce suit; and was, under the circumstances, quite justifiable. The costs relative to the distress I also think recoverable. The goods in the house belonged to the husband, and when they were threatened the wife consulted her attorneys, who informed the husband's attorney. The rent was in consequence paid, and the distress was saved. The whole transaction, therefore, was for the husband's benefit. As to the remaining items of the bill, there may be a doubt as to several of them, but, upon the whole, I am of opinion that the verdict was rightly entered for the plaintiffs.

Rule refused.

Attorneys for defendants: *Bower & Cotton.*

Distinguished. MASON
v. BURNINGHAM.
[1949] 2 K. B. 545

NORTH *v.* HOLROYD.

Jan. 20.

3 Q. L. 34

County Court—Appeal—Abandonment of portion of Claim—13 & 14 *Vict.* *c.* 61, *s.* 14.

In a county court plaint the particulars showed a claim for the balance of a sum of 54*l.*, reduced by various deductions to 19*l.* 12*s.*; but, by a miscalculation apparent on the face of the particulars, one of the items of deduction was stated at 11*l.* 7*s.*, instead of 10*l.* 7*s.* At the request of the defendant, who wished to appeal, but against the will of the plaintiff, the judge amended the particulars by inserting the real balance, viz. 20*l.* 12*s.*, but permitted the plaintiff to abandon the excess, and a verdict was found for 19*l.* 12*s.*:—

Held, that the plaintiff could not abandon the excess so as to deprive the defendant of his right of appeal.

CASE on appeal from the Leeds County Court.

The plaintiff sued the defendant for 19*l.* 12*s.*, the balance of an

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account of 54*l.* In the particulars of claim various items of deduction were stated, which, as carried out in the particulars, reduced the amount from 54*l.* to 19*l.* 12*s.*; but among these items was the following:—"23 zinc cases at 9*s.*, 10*l.* 7*s.*," the true calculation making the item 11*l.* 7*s.* The learned judge ruled, in opposition to the defendant's contention, that there was evidence to go to the jury in support of the plaintiff's claim, and what then occurred is stated in the following paragraph of the case:—

"The defendant's counsel then called the attention of the judge to an error in calculation in the particulars of the plaintiff's claim, which, if truly added up, shewed the claim to amount to 20*l.* 12*s.*, instead of 19*l.* 12*s.* as delivered, and required the judge to amend the same accordingly. The plaintiff's attorney objected to any such amendment being made, but the judge ordered the correction to be made and the amount claimed to be increased to 20*l.* 12*s.*, [thus giving a power of appeal under the 13 & 14 Vict. c. 61, s. 14.] The plaintiff's attorney thereupon elected to abandon the excess over the 19*l.* 12*s.*, the amount for which the plaint was entered. Defendant's counsel objected to this, on the ground that such abandonment was made for the purpose of depriving the defendant of his right to appeal, which he had previously stated his intention to exercise; but the judge allowed the plaintiff to abandon the excess, and claim only for 19*l.* 12*s.*, the sum originally inserted in the plaint note."

The jury found a verdict for the plaintiff for 19*l.* 12*s.*; and the judge then, at the defendant's request, stated this case: one of the questions for the Court being, whether on the facts stated in the above paragraph the defendant had a right of appeal.

Pollock, Q.C., for the defendant, contended that in substance the claim was for an amount exceeding 20*l.*, and that the defendant's right of appeal was therefore vested, and could not be taken away by a subsequent abandonment, any more than by the verdict being for a less sum than 20*l.*: *Dreesman* v. *Harris.* (1)

J. A. Russell, for the plaintiff, contended that no appeal lay; in form the particulars claimed less than 20*l.*, and the plaintiff had a

(1) 9 Ex. 485; 23 L. J. (Ex.) 210.

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right to abandon the excess when it appeared that he was entitled to more than he had supposed. He cited *Blowers* v. *Rackham*. (1)

[CHANNELL, B. The record as amended shews a claim of more than 20*l.*; how can this be contradicted?]

KELLY, C.B. The defendant is entitled to our judgment. The particulars of demand claim the balance of an account. It is true that a sum of 19*l.* 12*s.* only is claimed in form; but the amount really claimed is the balance of 54*l.*, after the deduction of certain items, the miscalculation of one of which reduces the claim to the sum named. In substance, therefore, it is a claim not to 19*l.* 12*s.*, but to 20*l.* 12*s.*; and the plaintiff would have been entitled to have his particulars amended so as to enable him to claim that sum; such an amendment would be made as a matter of course. When it is once ascertained what the real claim is, the question is settled; for it is impossible to say that the plaintiff can abandon his claim so as to deprive the defendant of his right of appeal, which was already vested by the bringing of a claim exceeding 20*l.*

MARTIN and CHANNELL, BB., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *R. & W. B. Smith.*
Attorneys for defendant: *Emmet, Son, & Emmet.*

Considered. BOILER, ETC., CO. OF CANADA *v.* SHERWIN-WILLIAMS CO. LD. [1951] A. C. 319

STANLEY *v.* THE WESTERN INSURANCE COMPANY.

Jan. 20.

Policy—Fire—Construction—"Gas"—"Explosion."

A policy of fire insurance contained the following exception: "Neither will the company be responsible for loss or damage by explosion, *except* for such loss or damage as shall arise from explosion by *gas*." In the premises of the plaintiff (the insured), who carried on the business of extracting oil from shoddy, an inflammable and explosive vapour evolved in the course of the process escaped and caught fire, setting fire to other things; it afterwards exploded and caused a further fire, besides doing damage by the explosion:—

Held, first, that the word *gas* in the policy meant ordinary illuminating coal gas.

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(1) 20 L. J. (Q.B.) 397.

Secondly, that the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred in the course of a fire; and that it exempted the defendants in respect both of the damage from the explosion itself, and of the damage done by the further fire caused by the explosion.

Special case stated by an arbitrator in an action upon a fire policy on the plaintiff's business premises, effected by the plaintiff with the defendants, and containing the following clause:—

"Losses by lightning will be made good by this company, as far as where either the building or the effects insured have been actually set on fire thereby, and burnt in consequence thereof. No allowance will be made for any hay, corn, agricultural produce, or other property which may be destroyed or damaged by its own natural heating, nor for any goods which may be destroyed or damaged while undergoing any process in or by which the application of fire-heat is necessary; *neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas.* This company will not be answerable for any loss or damage by fire occasioned by any invasion, foreign enemy, insurrection, civil commotion, riot, or any military or usurped power whatsoever."

The plaintiff's business was that of extracting oil from shoddy, which is done in the following manner:—The shoddy is placed in an "extractor," into which is pumped from below bi-sulphide of carbon; this, rising through the shoddy, disengages the oil, which flows off, through a hole at the top of the extractor; the bi-sulphide is then drawn off and steam is introduced, which carries off the residue of bi-sulphide and oil remaining in the extractor into a still, where they are separated; the vapour which thus passes from the extractor would, in chemical terminology, be called a vapour and not a gas, being condensible at a temperature above 32° (viz. 109°) Fahr.; but the distinction between gas and vapour is merely a conventional one, though known and recognized by chemists. The vapour in question is highly inflammable, and when mixed with air in the proportion of one to fifteen is explosive.

The accident was caused by a leakage in the gaskin (or packing of canvas) which lies between the lid and rim of the extractor, coupled with a stoppage in the pipe between the extractor and the

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still. The vapour escaping through the hole, took fire at the lamps and ignited some matting and bags lying near, and becoming sufficiently mixed with air exploded. The explosion blew off the roof, and blew down part of the walls; after which the fire became general, and burnt for some time.

The plaintiff claimed to recover for the whole loss on the ground that the vapour in question was gas within the meaning of the policy; or that, if not, the exception of explosion applied only to cases where the fire was originated by the explosion, not where the explosion occurred in the course of the fire, and therefore did not include the present case.

The question for the opinion of the Court was, whether the plaintiff was, under the circumstances, entitled to recover for the damage done by the explosion, or for the damage done by fire subsequent to the explosion.

Quain, Q.C. (*R. G. Williams* with him), for the plaintiff, cited *Austin* v. *Drewe* (1); *Everett* v. *London Assurance* (2); 1 Phill. Ins. p. 45; 2 Parsons' Contr. 5th ed., p. 416, and the cases there referred to; and *St. John* v. *American Mutual Fire and Marine Insurance* (3); his arguments are sufficiently stated in the judgment of the Court.

Holker (*Brett, Q.C.*, with him), for the defendants, was not called on.

KELLY, C.B. The words of the policy are to be construed not according to their strictly philosophical or scientific meaning, but in their ordinary and popular sense. Now in the ordinary language, not only of men of business, and the owners of property (the subject of insurance), but even of scientific men themselves, the explosion in the present case would not be said to have been caused by *gas*. It was not, therefore, within the saving to the exception, which, indeed, was obviously intended by the parties only to refer to gas in the more limited sense of ordinary illuminating gas.

Mr. Quain has ingeniously argued that, reading this exception together with the preceding exceptions, the real meaning is

(1) 6 Taunt. 436.

(2) 19 C.B. N.S. 126; 34 L.J. (C.P.) 299. 11 Jur. N.S. 546.

(3) 1 Kernan R. 516.

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this; that the company are not to be responsible for any loss arising from explosion, provided the explosion is not occasioned by a fire already in existence upon the premises; but, on the other hand, if there be already a fire upon the premises so that the explosion is incidental to and is occasioned by that fire, and then lends itself to further the fire and so to increase the loss, the whole of the damage caused is within the insurance of the policy. But to give the instrument this construction would be, in fact, to introduce into it words not found there; while the natural construction of the words gives a probable and easily intelligible sense. In consequence of the wide-spread and highly mischievous effects of explosions, the policy excludes liability for any of their consequences. If there be a fire, in the course of which an explosion occurs, for the result of the fire, unconnected with the explosion, the defendants make themselves liable, but not for any of the consequences of that explosion. But Mr. Quain further contends that the opposite construction should be given to the policy, on the ground that where a fire arises, and in the course of the exertions made to extinguish it property is destroyed or injured, this loss is covered by the insurance against fire. I agree that any loss resulting from an apparently necessary and bonâ fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy. But that an explosion under those particular circumstances would not be within the exception, affords no ground for excluding from it this explosion, which arises in a totally different mode, and to exclude which would almost amount to expunging the clause altogether from the policy.

It remains only to point out the principle on which the arbitrator will have to ascertain the liability of the defendants. (1) If it

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(1) The arbitrator had only found the amount of the damage by fire before explosion, the amount of damage by fire both before and after, and the amount of damage by the explosion itself; but not the extent to which the fire after the explosion was due to the explosion itself, or only to the extension of the fire previously existing; for the purpose of ascertaining this, the case was remitted to him.

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should appear, from further inquiry, that any portion of these premises or property has been destroyed or injured by reason of the original fire, or any subsequent extending of that fire unconnected with the explosion, and the amount of such loss exceeds the sum paid into court, the plaintiff is entitled to a verdict for that sum. But if it should turn out that the whole loss occasioned by the original fire is met by the sum paid into court, and all the remaining loss arose from the shock of the explosion, or from a fire occasioned by the explosion, and from that only, the verdict ought to be entered for the defendants.

MARTIN, B. I am of the same opinion. It seems to me that the question depends entirely on the words in the policy beginning with "neither" and ending with "gas;" and that they are to be construed without reference either to the preceding or subsequent condition. They are to be construed according to their natural meaning, and as ordinarily understood by mankind. There is nothing to qualify the word "explosion," and I apprehend, therefore, that the company bargain, and the insured agrees with them, that they are not to be responsible for any loss or damage by explosion. The clause is exceedingly simple, and we should not be justified in adding words to give it the most artificial meaning which Mr. Quain contended for. Next, what is the meaning of "gas?" I apprehend it means gas as ordinarily understood by mankind, and not as the word may be used in works of art. With respect to the extent of the damage I should say that, even if the consequence of the explosion was to create a concussion that caused the existing fire to burn more strongly than before, that would be a loss by fire within the policy and not within the exception, but that as to what was caused by the explosion, the defendants are not liable. But if the plaintiff cannot distinguish the one from the other, that misfortune must fall on him and not on the defendants.

CHANNELL, B. I am of the same opinion. The gas in question is not illuminating gas, either oil gas or coal gas. These gases are used of necessity. I say necessity with reference to the exigencies of the ordinary business of life; and they are such as the parties

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must have had in their minds as essential to the carrying on of any factory or business. It is to such that the provision relates.

Case remitted to arbitrator with opinion of the Court.

Attorneys for plaintiff: *Sharpe, Parkers, & Co.*

Attorneys for defendants: *Shaw & Tremellen, for Blair & Binney, Manchester.*

Jan. 23.

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BENCE *v.* GILPIN.

Copyhold—Surrender to Joint Tenants—Admittance of one Surrenderee—Disclaimer by others before admittance—Time for Disclaiming—Effect of previous acts of ownership—Lord's Fine.

A disclaimer by two out of three joint tenants, surrenderees of certain copyhold lands belonging to a manor, executed *before* the admittance of the remaining joint tenant, but *after* the exercise by all the three of various acts of ownership over the estate, is void, and the lord is entitled to a fine as upon the admittance of all.

SPECIAL CASE.

The plaintiff is lord of the manor of Kelsale, in the county of Suffolk. At a court duly held for the manor on the 31st of October, 1838, Stephen Capon was admitted a customary tenant of certain lands holden of the manor. He afterwards sold these lands to George Cuddon, to whom, however, no surrender passed and who was not admitted tenant on the court rolls. On the 1st of September, 1864, Capon, at the instance of Cuddon, surrendered the lands to the use of John Feltham, Samuel Hayhurst Lucas, Robert Ingham, and Charles Gilpin (the defendant), in consideration of 13,000*l.* advanced by them to Cuddon. The surrender was conditioned to be void, if Cuddon paid the sum advanced with interest on the 30th of April next ensuing, otherwise to remain in force. It was duly enrolled on the 6th of September, 1864, at the request of the mortgagees. Cuddon having made default in payment of the money advanced, and thereafter John Feltham having died, the surviving mortgagees and one John Whetham, in whom Feltham's interest had vested in equity, gave notice to the tenants in possession of the estate comprised in the conditional surrender to pay them the rent then due.

The notice was not obeyed, whereupon Lucas, Ingham, and Gilpin (the legal owners of the property) in June, 1865, brought an action for the recovery of the rents which thenceforward were duly paid. In the spring of 1866 the property was advertised for sale by public auction by order of the mortgagees. Shortly afterwards, on the 14th of April, 1866, Lucas and Ingham executed a deed of disclaimer, whereby they "disclaimed, released, and quitted claim unto Charles Gilpin, his heirs, &c., according to the custom of the manor," all the premises included in the surrender. On the 16th of April the sale took place. It was ratified, and the receipt of the deposit money was acknowledged by the auctioneer who was expressed to be acting as agent for the vendors, Lucas, Ingham, Gilpin, and Whetham.

After the disclaimer and sale, an application was made to the steward of the manor to admit Charles Gilpin, the defendant, as sole tenant, to enrol the deed of disclaimer and to assess the fine as on the admittance of a single tenant. The steward declined to enrol the disclaimer, but offered to admit any one of the mortgagees, and on the 21st of January, 1867, the defendant was duly admitted.

The question for the opinion of the Court was, whether the fine payable was to be calculated as on the admittance of one tenant only, or as upon that of three or of four tenants. If payable as on the admittance of one only, a verdict was to be entered for the defendant. If as on the admittance either of three or of four, a verdict was to be entered for the plaintiff either for 969*l.* 13*s.* 3*d.*, or 1136*l.* 5*s.* 5½*d.*, as the case might be.

Jan. 22, 23. *Sir J. B. Karslake, A. G.* (*Waley* and *Lopes* with him), for the plaintiff. In the absence of a disclaimer, the admittance of one joint tenant is the admittance of all. The question here therefore is, whether this disclaimer was valid? It was executed after many acts of ownership had been done by the surrenderees disclaiming, and was too late. A disclaimer, in order to be good, must be executed before anything has been done to accept the estate: Shep. Touchstone by Preston, 7th ed. p. 70; *Thomson* v. *Leach* (1); *Nicloson* v. *Wordsworth* (2); *Stacey* v. *Elph* (3); *Begbie*

(1) 2 Ventris, 198. (2) 2 Swanst. 365. (3) 1 My. & K. 195.

v. *Crook* (1); *Doe* d. *Chidgey* v. *Harris.* (2) And this rule applies equally to copyholds and to freeholds. In the former case the admittance relates back to the surrender, and must be pursuant to it. Both together make but one conveyance, of which the *substance* is the surrender: *Roe* d. *Noden* v. *Griffiths* (3); *Vaughan* d. *Atkins* v. *Atkins* (4); *Doe* d. *Bennington* v. *Hall.* (5) Where, therefore, the persons to whom the surrender was made do not immediately, or before interfering with the estate, disclaim, they cannot afterwards, by merely executing a disclaimer, deprive the lord of the fine he would otherwise receive on the admittance of one of their number.

The case of *Lord Wellesley* v. *Withers* (6) is not an authority for the defendant. There there was a devise of copyhold to three persons in fee, who were also named executors. The three proved the will, and then two released their estate to the third that he might be admitted alone. It was held that this release (being before admittance) operated as a disclaimer, and that it was one which the two executors were entitled to make. The fact of all three having acted as executors did not preclude them from doing so. But in that case the disclaiming executors had done no act to signify the acceptance of the copyholds, and nothing was decided except that an acceptance of personalty was not inconsistent with a renunciation of realty. An estate cannot be forced on any one against his will; but if he in any way "takes to" it, he cannot afterwards repudiate it. In Preston on Abstracts, vol. 2, p. 226, it is said: "In copyhold titles it is frequently of great convenience that when several persons are named as joint tenants, and a fine on admission would be increased on account of the number of tenants, all of them except one should, when this may be done without prejudicing the execution of the trusts, release to that one or disclaim in his favour, so as to make him sole tenant." There is no objection to such a course, but it must be adopted before the trustees have exercised their trust, otherwise it cannot deprive the lord of his right to a fine as on the admittance of all. In this case, therefore, the lord is entitled at all events to a fine in respect of all the surviving mortgagees.

(1) 2 Bing. N. C. 70.
(2) 16 M. & W. 517.
(3) 4 Burr. 1952.
(4) 5 Burr. 2764.
(5) 16 East, 208.
(6) 4 E. & B. 750. 1 Jur. N.S. 706

[The claim of a fine for the deceased mortgagee was abandoned.]

Mellish, Q.C. (*Beresford* with him), contrà. There is a difference between copyhold and freehold property. In the latter, the estate passes immediately on the execution of the conveyance to the grantee: in the former, there is nothing but an inchoate estate in the grantee until admittance. Thus no release by one joint tenant to another can be made before admittance: *Mortimore's Case* (1); Preston on Abstracts, vol. 2, p. 30. No legal estate passes by the surrender, although when the admittance does take place it relates back to the surrender: Scriven on Copyholds, 4th edition, vol. 1, p. 140. Until admittance, however, there is no interest which the law can recognise: *Berry* v. *Greene* (2); *Doe* d. *Shewen* v. *Wroot* (3); *Doe* d. *Tofield* v. *Tofield.* (4) It follows that an act of ownership, whilst in the case of freehold it would be incidental to the estate and prevent disclaimer, in the case of copyhold is *in law* a mere trespass. If the disclaimer relied on is invalid, the result will be that, although the joint tenants have too little estate to release, they have too much to disclaim. It is, in truth, quite immaterial what acts of ownership are done previous to admittance. They are of no effect, because until admittance there is no legal estate in the surrenderees to which they can relate. There is no injustice to the lord in this construction, and the fine payable is in accordance with the principle laid down in *Wilson* v. *Hoare.* (5)

With regard to the acts of ownership relied on, first, the request to enrol the surrender was simply to give notice to any subsequent incumbrancer; second, the notice to pay rent was not given on behalf of the surviving mortgagees only; it was also on behalf of the representative of the deceased joint tenant, who could not have any legal interest. Moreover, it was primarily for the protection of the mortgagees, and not for the purpose of asserting ownership. The mortgagor himself had only an equitable title. Third, the advertising the premises for sale was also both in the name of the surviving mortgagees and of the representative in

(1) Hetley, 150.
(2) Cro. Eliz. 349.
(3) 5 East, 132.
(4) 11 East, 246.
(5) 2 B. & Ad. 350.

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equity of Feltham, and the auctioneer professed to act as the agent of all.

Sir J. B. Karslake, A. G., in reply, was stopped.

KELLY, C.B. I am of opinion that the plaintiff is entitled to a fine on the admittance of this tenant as upon the admittance of all the three joint tenants. The claim originally made in respect of the fourth has been abandoned. The facts of the case are very clear. A person named Cuddon, being equitably entitled to certain copyhold property, mortgaged his interest to four persons, and the mortgage was in the form of a surrender to their use, whether as trustees or otherwise. One died after the surrender, but previously the mortgagees had called on the steward of the manor to enrol the surrender, and it had been enrolled accordingly. Then, the rents of the occupying tenants being in arrear, the three joint tenants gave the occupiers notice to pay their rents; and on another occasion gave directions and advertised the property for sale. The notice to pay rent having been disregarded, actions to recover what was due from the various tenants were brought in the name of all three surrenderees.

We now come to the execution of the disclaimer, whereby two out of the three joint tenants disclaimed their rights to the third who then claimed to be admitted; and, on the landlord demanding a fine from all the three, the two who had disclaimed denied their liability, and insisted that they were not bound. Now, primâ facie, the admittance of one joint tenant would operate as the admission of all his co-tenants, and the lord would be entitled to demand a fine in respect of each. But in this case it was contended that he cannot be so entitled, inasmuch as two out of the three joint tenants had disclaimed, and it is argued that they had a power to disclaim, although they had acted as owners of the property in demanding rents, in advertising the property for sale, and otherwise. Is this a valid proposition? It is admitted, or if not, it is my clear opinion, that the disclaimer was absolutely void as regards the beneficial ownership of the surrenderees, or as regards the duties and liabilities of all or any of them as trustees. It is plain that these three persons remained equitable owners of the property, and equally charged with the execution of any trusts concerning it;

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and the question is, whether this disclaimer, void as it is as respects the equitable interest of the surrenderees and as respects their trust-duties or liabilities, is nevertheless valid so as to deprive the lord of a fine for each joint tenant.

Now it is clear that there is a reciprocity between a lord of a manor and a tenant. The tenant (the surrenderee) has a right to call on the lord to admit him, and it cannot be that whilst the lord *must* admit him, he is to have no rights of his own, no power to possess himself of the rents and services incidental to copyhold tenure, if not to compel the tenant's admission. On the contrary, the parties enjoy reciprocal rights. Thus these three surrenderees on their side have an undoubted right to enforce admittance. The lord, on his side, has a remedy, though not of the same description. If the premises are empty, he can seize quousque, and directly the admittance of one of several joint-tenants actually takes place, it operates, in the absence of any special circumstances, as the admittance of all, and he is entitled to a fine the same in amount as if all had been admitted.

But then it is said that the obligation of two out of these three surrenderees was ended by the disclaimer. This leads us to inquire when and how that disclaimer was made. The surrenderees, we find, before it was made, did all that owners, whether trustees or beneficially entitled, could do, and after all the various acts of ownership to which I have referred were done, two of them execute a disclaimer. I am of opinion that, under these circumstances, it was void. A disclaimer, to be worth anything, must be an act whereby one entitled to an estate immediately and before dealing with it renounces it; whereby, in effect, he says, "I will not be the owner of this property." But for a person who has already possessed himself of an estate and acted as its owner, to come and say "I will not be its owner," is really a contradiction in terms, and I think the attempt to escape a fine by such means must be unsuccessful.

As to authority, it seems that there is no direct decision that a disclaimer so executed is void against the lord as it clearly is for all other purposes. The case of *Lord Wellesley* v. *Withers* (1), however, so far as it bears on the present case at all, is rather in

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(1) 4 E. & B. 750. 1 Jur NS 706

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favour of the plaintiff than the defendant. There four persons were entitled to real and personal property under a will, as devisees and executors. Three of the four took out probate and assumed the character of executors. But as to the copyhold estate comprised in the will, two of these three, from the time of the testator's death, rejected and renounced it. They did no act whatever whence it might have been inferred that they had taken the estate on themselves, and in due time they executed a disclaimer. That was, however, a disclaimer in its true and proper sense. No man is bound to take an estate against his will, and they never had taken it. Then it was contended that, having assumed the office of executors, they had no power to disclaim as to the copyhold property, but were bound to take it as well as the personalty. But if two persons are made executors and trustees of realty, there is no reason why they should not act as to the personalty, and renounce as to the realty; and it was on this ground that the Court held the disclaiming executors were not bound to pay any fine on the admittance of their co-executor, who was to be treated as sole devisee.

It is to be noticed that in the present case there was a *release* as well as a disclaimer, and, in form, the instrument no doubt might operate as either. However, though that is so, until the joint-tenants have been admitted, until they have acquired a legal title, there is no estate on which the release can operate. That is shown by the authorities, and indeed may be inferred from the decision of *Lord Wellesley* v. *Withers* (1), where the instrument executed was in fact a release, but having been executed previous to admittance, the Court acting on the principle "interpretatio chartarum benigne facienda est ut res magis valeat quam pereat," held it to be equivalent to a disclaimer.

Upon principle and authority, therefore, I am of opinion that, where an instrument like that we are now dealing with is executed under circumstances such as appear in this case, it is invalid to disentitle the lord to the fine to which he would otherwise be entitled. By this decision I do not wish to be considered as in any way impeaching the high authority of Mr. Preston. It may be often a very wise thing for all but one of several devisees in trust

(1) 4 E. & B. 750. Jur NS 706

to disclaim, and thus save the fines which would otherwise be payable. But that course can only be properly taken when the trusts in the will are immediately on the production of the will accepted or rejected. If rejected by all but one, that one remains thenceforth the sole devisee, and alone liable to the fine. But here all the three surrenderees had acted conjointly almost up to the time of action brought, and that being the case I think we ought to hold that the lord was entitled to a fine in respect of all the three.

CHANNELL, B. In this action the lord of the manor of Kelsale seeks to recover certain fines which he alleges to be due to him on the admittance of the defendant. In the early stage of the controversy he appears to have preferred a claim founded on an admittance of all four surrenderees; but one of the four being dead before admittance, no claim is now pressed in respect of him. The question, therefore, stands thus:—If the lord of the manor has a right on the admittance of the defendant Gilpin to the same fine as upon an admittance of all the three surrenderees, he will be entitled to our judgment. If, on the other hand, only a single fine is payable, our judgment must be for the defendant.

The case has raised some questions not often discussed in this Court. Now, I am ready to admit that in many respects there are important differences between copyhold and freehold tenures. But I am of opinion that there are none which prevent us from giving judgment for the lord in this case. Some points are clear, and to these I will first refer. It is clear, for instance, that the title of the tenant upon admittance relates back to the surrender. The surrender has no operation against the lord without an admittance. And looking at the question in that point of view, the matter to be decided is whether the admittance in this case was in point of law that of one person only or of three. If of one only, then the defendant, as I have said, must succeed; but if, *though on the application of one,* it was in point of law the admittance of three, then the lord is entitled to the whole amount he claims.

Again, I accede to the argument that surrenderees of a copyhold estate are merely—in one sense—equitable owners. The title made by surrender may be good as between surrenderor and surrenderee, but the surrenderee has before admittance no legal estate.

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This circumstance causes the only difficulty I feel in the case, because, as Mr. Mellish pointed out, in the case of ordinary freehold property, the grantee takes an immediate legal estate, whereas in the case of copyhold he does not. As surrenderee he has an equitable interest only. Still there can be no doubt that when these three surrenderees requested to have the surrender enrolled, and when it was enrolled, there was an estate of some description in them as joint tenants. Then, applying the rule that an admittance relates back to the surrender, and considering that the surrender was to the surrenderees as joint tenants, the admittance turned the estate of all of them into a legal estate; and had this estate been freehold, if the grantees had done any act acknowledging ownership and had acted as owners, they could not have disclaimed. They might have executed a release but not a disclaimer.

Is, then, the document on which the defendants rely, a valid disclaimer? Admitting the distinction between copyhold and freehold estate, I think that the acts of ownership exercised previous to the disclaimer estop the surrenderees from setting it up for their own benefit. Then, apart from the disclaimer, the admittance of one joint tenant is the admittance of all his co-tenants, and relates back to the surrender. Here the surrender was to all three defendants, and unless any of them had got rid of the estate so passed to them, they all remained joint tenants under the surrender until the admittance, and the admittance of one of them was the admittance of all. The lord, therefore, is entitled to the fine he claims in respect of all the three.

Judgment for the plaintiff to enter the verdict for 969l. 13s. 3d.

Attorneys for plaintiff: *Gregory, Rowcliffe, & Rawle.*
Attorneys for defendant: *Davidson, Carr, & Bannister.*

MUDGE *v.* ROWAN.

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Jan. 28.

Bankruptcy—Husband and Wife—Separation Deed—Covenant to pay Annuity during separation—Contingency—12 *&* 13 *Vict. c.* 106, *s.* 175—24 *&* 25 *Vict. c.* 134, *s.* 154.

By a deed of separation a husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future cohabitation by mutual consent:—

Held, that this was not an "annuity" provable under 12 & 13 Vict. c. 106, s. 175, nor a liability to pay money under 24 & 25 Vict. c. 134, s. 154.

4 QB 265 –
— 784. 7,
6 Ex 315 –
6 Ch 584
13 Eq 72 –
9 Ch 672
5 Ch D. 37
13 Ch D 26

Declaration by the trustee of the wife of the defendant for unpaid instalments of an annuity covenanted to be paid by the defendant to the plaintiff, under a separation deed.

Plea: Bankruptcy. Issue.

The deed, after providing for the payment of the annuity in quarterly instalments, declared, that in case the defendant and his wife should at any time thereafter, with their mutual consent, come together and cohabit as man and wife, then and in such case and from thenceforth the annuity should cease to be payable.

At the trial in the Liverpool Passage Court in October, 1867, before the Recorder (sitting for the Assessor), it appeared that some of the instalments sued for had accrued due before, and some after, the defendant's bankruptcy. A verdict was entered for the plaintiff for so many of them as had accrued due since the bankruptcy, with leave to move to enter a verdict for the defendant on the ground that the whole claim was provable under the bankruptcy, and that the order of discharge was therefore a bar to the recovery of any part of it.

The Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 175, enacts that, "any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the Court shall ascertain, regard being had to the original price given for such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the fiat or the filing of the petition for adjudication of bankruptcy."

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The Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 154, enacts that, "if any bankrupt shall at the time of adjudication be liable by reason of any contract or promise, to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained and to receive dividends thereon."

In Michaelmas Term a rule was obtained, in pursuance of the leave reserved, against which

January 28. *R. G. Williams* shewed cause; first, the arrears subsequent to the bankruptcy were not provable under 12 & 13 Vict. c. 106, s. 175. The annuity in this case is not within the meaning of that section. *Parker* v. *Ince* (1), is an express authority on the point. In that case Martin, B., says:—(2) "It is quite idle to suppose that any value can be put upon such an annuity. How can you calculate whether a man and his wife will come together again? Their doing so depends on a thousand circumstances it is impossible to estimate." The section contemplates annuities, the duration of which is capable of present calculation, and for the giving of which a sum of money is paid down.

[CHANNELL, B. In *Ex parte Parratt* (3) an annuity, payable during the time that the annuitant superintended some salt works, which might however be discontinued either by the brine not flowing, or by the pits being forfeited, was held to be within the section.]

In that case the annuity was sufficiently defined to admit of its being calculated. Secondly, this claim is not a "debt payable on a contingency" within 12 & 13 Vict. c. 106, s. 177, nor a liability to "pay money on a contingency" within s. 178 of the same act, *Mitcalfe* v. *Hanson*. (4) [This point was conceded on the part of

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(1) 4 H. & N. 53; 28 L. J. (Ex.) 189.

(2) 28 L. J. (Ex.) at p. 192; 4 H. & N. at p. 63.

(3) 1 Deac. 696.

(4) Law Rep. 1 H. L. 242.

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the defendant]. Thirdly, it is not within 24 & 25 Vict. c. 134, s. 154. The "other sums of money" there mentioned must be sums similar to premiums on a policy of insurance. The object of the section was to relieve the debtor from any liability to pay premiums. It was not intended to release him from an obligation such as the present. [He also cited *Saunders* v. *Best* (1); *General Discount Company* v. *Stokes.* (2)]

Charles Russell in support of the rule. First, to bring an "annuity" within 12 & 13 Vict. c. 106, s. 175, it is not necessary that it should be granted for a pecuniary consideration: *Ex parte Annandale* (3), a case decided under 6 Geo. 4, c. 16, s. 54, where the words are substantially the same as in s. 175. Any annuity capable of calculation is within the section. In *Ex parte Parratt* (4), the time for which the annuity would endure was as uncertain as here; so also in *Ex parte Van Heytheysen* (5) where the annuity was payable on the contingency of marriage. The calculation need not be accurate.

[KELLY, C.B. The contention on the other side is, not that an accurate calculation cannot be made, but that any calculation is absolutely impossible.]

There is nothing impossible in estimating the present value of an absolute covenant to pay an annuity with a defeasance that it shall terminate under certain circumstances. It is the covenant which has to be valued, and the only element of uncertainty is in the proviso; and it was at least as difficult in *Ex parte Parratt* (4) to estimate the chance of the brine stopping or the pits being forfeited, as it would be in this case to estimate the chance of the parties living together by mutual consent. In *Parker* v. *Ince* (6), the covenant was not to pay an annuity simpliciter, but a sum of money to be made up to an annuity of a certain value, after taking a variety of circumstances into account, and it was that which was treated by the Court as the insuperable element of uncertainty. The effect of the proviso in the deed was only incidentally touched upon. Secondly, the words "other sums of money" in 24 & 25

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(1) 17 C. B. (N.S.) 731. 10 Jur NS 1204

(2) 17 C. B. (N.S.) 765; 34 L. J. (C.P.) 25. 10 Jur NS. 1205

(3) 2 Mont. & A. 19.

(4) 1 Deac. 696.

(5) 1 Deac. 360.

(6) 4 H. & N. 53; 28 L. J. (Ex.) 189.

Vict. c. 134, s. 154, are not to be taken to apply to matters strictly ejusdem generis with premiums on policies of insurance. The policy of the law has recently been to release the debtor from obligations of every kind, and the section should therefore be construed liberally.

KELLY, C.B. This case is by no means free from difficulty. It is no doubt the general object of the bankruptcy laws to set a debtor free from every kind of liability, capable of valuation, to which he may be subject, whether his liability depends on a contingency or not. But the claim made here against the bankrupt is very peculiar. The object of a separation deed, generally, is not to secure an annuity to the wife for any definite period, but rather to secure to her an allowance for her maintenance so long as the separation between herself and her husband shall continue. Accordingly there is in this deed, as in most others, a condition that the deed shall be void upon the parties mutually agreeing to live together again. But we must remember that there is nothing to prevent the husband from at any time coming forward and insisting that his wife shall once more live with him. Nor, on the other hand, is there anything in the deed which would prevent the wife from instituting a suit for restitution of conjugal rights. This being so, the annuity seems to me to be so uncertain in its nature as to be impossible to be valued. In many cases the Commissioner of Bankruptcy may have to deal with contingencies the value of which depend on a variety of considerations, and where the valuation is very difficult. But here I am at a loss to see any single circumstance upon which a calculation of any kind could be based. If the deed could only be avoided by mutual consent, even then there would be such a variety of circumstances to be taken into account in estimating the value of the annuity granted as to make its valuation absolutely or almost impossible. The law cannot, in my opinion, have intended to cast such a duty on the commissioner. Moreover, there is always the chance, or rather the legal presumption, to be considered that one or both of the two parties will do what they ought to do, wholly independent of the provisions of the deed. In either point of view, whether we regard the possibility of the parties mutually agreeing to come together, or of one or other of them seeking to compel a restitution of conjugal rights, the contingency is really impossible to be calculated. I am, therefore, of opinion that the instalments of the annuity which have accrued due since the bankruptcy are recoverable. This rule must, accordingly, be discharged.

MARTIN, B. I am of the same opinion. I am satisfied that this case does not come within the provisions of 24 & 25 Vict. c. 134, s. 154. There is no similarity between a claim of this sort and premiums on a policy of insurance, and the general words used in the section must be applied to claims akin in character to premiums on a policy. Then, as to 12 & 13 Vict. c. 106, s. 175, I adhere to the view I expressed in *Parker* v. *Ince*. (1) This contingency depends on an infinite variety of circumstances, into which it is idle to suppose a commissioner could inquire. I entirely concur with the Lord Chief Baron in the general observations he has made. The bankruptcy of a man, moreover, has nothing to do with the duty incumbent on him to provide for his wife. That duty exists just as much after as before his bankruptcy. In any view which can be taken of the case, therefore, I think the bankruptcy of the defendant no bar to this action. The rule must, therefore, be discharged.

CHANNELL, B. I am of the same opinion. The tendency of recent legislation, and the course of recent decisions, has been to free a debtor who becomes a bankrupt from all liability of every kind; but I do not think an order of discharge a bar to such a claim as the present. I agree with my Brother Martin that the case does not fall within 24 & 25 Vict. c. 134, s. 154. Then the question arises, whether it is within the unrepealed provisions of the old Bankruptcy Acts? I think that it is not. At the same time I wish to throw no doubt on the correctness of the decision in *Ex parte Annandale*. (2) I quite admit that, to bring an annuity within the act of 1849, it is not necessary to have any actual pecuniary consideration. I also feel that in many cases the difficulty of calculating the present value of contingencies may be very great, and yet they may be within the acts. But here it appears to me that the difficulty is insuperable.

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(1) 4 H. & N. 53; 28 L. J. (Ex.) 189.

(2) 2 Mont. & A. 19.

Rule discharged.

Attorneys for plaintiff: *Nethersole & Speechly.*
Attorneys for defendant: *Vizard, Crowder, & Anstie.*

Jan. 30.

RYDER *v.* WOMBWELL.

Infant—Necessaries—Province of Judge and Jury—Evidence.

4 ChD 5823
584,

Articles of mere luxury cannot be necessaries suitable to the condition of any infant. But articles of utility, although luxurious and expensive, may be; and whether they are so or not is a question for the jury in each particular case, subject to the control of the Court as to their verdict.

Per Bramwell, B., articles which are *primarily* for mere ornament or amusement, cannot be necessaries, although they may possibly be turned to a useful purpose.

The plaintiff sued the defendant, a minor, for the price of a pair of jewelled solitaires, worth 25*l.*, and of an antique silver goblet, worth 15*l.* 15*s.*, which the plaintiff knew, when he supplied it, was intended by the defendant for a present. The defendant was the son of a baronet, with no establishment of his own to keep up, and in the enjoyment of an allowance of 500*l.* a year. The question whether these articles were necessaries was left to the jury, who found that they were:—

Held (per Kelly, C.B., and Channell and Pigott, B.B.), that the question was rightly left to the jury, but that the finding as to the goblet was wrong.

Per Bramwell, B., that neither article was a necessary, and that a verdict for the defendant or a nonsuit ought to have been directed.

Revd 4 Ex 32

At the trial evidence was offered on the part of the defendant, to prove that, when the solitaires were supplied, he was already sufficiently provided with articles of a similar description. The judge rejected the evidence, as it was not proposed to shew that the plaintiff had knowledge of the fact.

Held (per Kelly, C.B., and Channell and Pigott, B.B., Bramwell, B., dissentiente), that the evidence was properly rejected.

Declaration for money payable for goods sold and delivered. The defendant pleaded a plea of infancy, to which there was a replication of necessaries. Issue.

The cause was tried before Kelly, C.B., at the London sittings after Trinity Term, 1867, when it appeared that the plaintiff sought to recover for the following articles of jewelry, supplied at various times to the defendant, a minor: 1st, a pair of crystal ruby and diamond solitaires, 25*l.*; 2ndly, a white glass smelling bottle, silver mounted and ornamented with coral, pearls, and turquoises, 6*l.* 10*s.*; 3rdly, an antique goblet, engraven with an inscription, 15*l.* 15*s.*; and, 4thly, a pair of coral ear-rings, 13*l.* 13*s.* The goblet, as the defendant told the plaintiff when he ordered it, was intended as a present to a nobleman, who was a friend of the defendant, and at whose house the defendant had frequently been received as a guest. The solitaires were stated to be used by persons of the rank of life to which the defendant belonged, as sleeve links: they were formed of crystal set in gold, and inlaid with diamonds in the form of a horse-shoe, in which the nails were represented by rubies. The defendant was the son of a deceased baronet, and was in the enjoyment of an allowance of 500*l.* a year during his minority. He had not an independent establishment, but resided chiefly with his eldest brother or his mother.

Evidence was offered on the part of the defendant that at the time of the purchase of the solitaires above mentioned, he had recently bought from other tradesmen articles of a similar description to a large amount, but it was ruled not to be admissible, as it was not proposed to shew that the plaintiff had knowledge of the fact. In summing up, the learned judge, who had refused to nonsuit, left it to the jury to say whether all or any of the articles supplied were necessaries, suitable to the estate and condition in life of the defendant. The jury found that the ear-rings and smelling bottle were not, and that the solitaires and goblet were, necessaries. A verdict was accordingly entered for the plaintiff for 40*l.* 15*s.*, being the price of the solitaires and goblet, with leave to move to enter a nonsuit if the Court should be of opinion that there was no evidence for the jury that either article was a necessary; or to reduce the damages by the price either of the solitaires or goblet, if the Court should be of opinion that there was evidence for the jury in respect of one or other of these articles only.

Bulwer, Q.C., obtained a rule nisi accordingly, and also for a new trial, on the ground of misdirection in this, that the learned judge ought to have directed the jury that the goods for the price of which the jury returned a verdict were not necessaries; also on the ground of the improper rejection of the evidence offered on the part of the defendant, that the defendant was at the time he

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purchased the solitaires of the plaintiff already supplied with similar articles; and also on the ground that the verdict was against the weight of evidence.

Coleridge, Q.C., and *Popham Pike*, shewed cause. "Necessaries" is a relative term, and what ought properly to be held "necessary" to an infant depends on the station in life which he occupies; per Parke, B., in *Peters* v. *Fleming.* (1) It is a matter of fact for the jury to decide in each particular case, subject to the direction of the judge as to the principles on which they are to base their decision. They should be told, as they were in this case, to have regard to the infant's condition.

[KELLY, C.B. If the article per se is useful, you would say that the fact of its being very costly and elegant does not the less render it a "necessary;" the jury are to determine whether it is or not.]

Articles of utility are not the less so because they are luxurious. Here the solitaires were certainly capable of being turned to useful account by the infant as sleeve links, and in that respect they differ from mere articles of luxury, such as pictures, for example, which are *incapable* of being necessaries. In *Chapple* v. *Cooper* (2), Alderson, B., says:—"Articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed." In *Brooker* v. *Scott* (3), the distinction thus pointed out is recognized. Where the articles, though elegant, are fitted for use, whether they are necessary or not, is a mixed question of law and fact to be left to the jury, subject to the opinion of the Court as to the manner in which they have exercised their judgment: *Maddox* v. *Miller* (4); *Wharton* v. *Mackenzie.* (5)

[PIGOTT, B., referred to *Harrison* v. *Fane.* (6)]

With regard to the goblet, that was no doubt intended for a present; but it was rightly left to the jury to say whether it was "necessary" or not. The defendant might not unnaturally consider that he owed some recognition to the nobleman in whose house he had often been kindly received. Having no house where he could reciprocate the courtesy, he made his host a present.

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(1) 6 M. & W. at p. 47.

(2) 13 M. & W. 252, 258.

(3) 11 M. & W. 67.

(4) 1 M. & S. 738.

(5) 5 Q. B. 606.

(6) 1 M. & G. 550.

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The jury thought it was "necessary" to his condition to do so. The Court might not have come to that conclusion, but still the verdict was not perverse, as in *Harrison* v. *Fane* (1), and ought not to be set aside.

As to the evidence of the defendant being already supplied with similar articles, it was rightly rejected. Even if the evidence had been admitted, it would have had no more bearing than the amount of the defendant's income on the present question, unless the plaintiff could have been proved to have known the fact of his being so supplied: *Burghart* v. *Hall.* (2) A tradesman, before supplying an infant with goods, is not bound to make inquiries as to whether he has already bought any of the same sort from anybody else. [They also contended that the verdict was not against the weight of evidence.]

Bulwer, Q.C., and *Mayd*, in support of the rule. First, the word "necessaries," it must be admitted, does not now apply simply to things necessary for subsistence, as was originally the case: Com. Dig. Tit. Infant, B. 5. But although its meaning has been relaxed, and it now includes many articles which, though not *actually* necessary, are suitable, and may reasonably be required, it has never yet been applied to anything merely luxurious. To be a necessary, an article must be primarily useful. Thus tobacco cannot, under ordinary circumstances, possibly be a necessary, and in *Bryant* v. *Richardson* (3), where a tobacconist sued an infant for cigars and tobacco supplied to him, it was held that the judge ought to have nonsuited.

(1) 1 M. & G. 550.

(2) 4 M. & W. 727.

(3) Exchequer, Feb. 8, 1866. *Bryant* v. *Richardson.* This was a cause tried before Bramwell, B., at the Middlesex sittings, in Hilary Term, 1866. The declaration was on the common money counts for money payable for goods sold and delivered, &c. Plea: Infancy. Replication, that the goods supplied were necessaries. Upon the trial it appeared that the defendant, who was an ensign in the Fusiliers, had, whilst an infant, been supplied in the space of six months, with a large quantity of cigars and tobacco. The plaintiff claimed 44*l.* 14*s.*, and the jury found a verdict for 20*l.* In the same term, *H. T. Cole* obtained a rule calling on the plaintiff to shew cause why there should not be a new trial on the ground that the judge misdirected the jury in not ruling, as matter of law, that the articles supplied were not necessaries, and also on the ground that the verdict was against the weight of evidence.

Willoughby shewed cause, and contended that the question was properly left to the jury to say whether the

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[BRAMWELL, B. That case does not touch the proposition, that where the article is both useful and luxurious it is for the jury to say if it be a necessary or not. You could not by any possibility place cigars and tobacco amongst useful articles.]

It has been held in other cases where utility is merely ancillary to luxury, that the judge ought to nonsuit. In *Wharton* v. *Mackenzie* (1) Coleridge, J., says:—"In some cases the question must be for the judge;" and in *Brooker* v. *Scott* (2) where the goods sued for were dinners, confectionery, fruit, &c., supplied to an infant undergraduate, the Court directed a nonsuit to be entered. Now these solitaires, looking to their material and costly workmanship, are primarily articles of luxury. They *may* be turned to a useful purpose, but that is not enough. The *primary* object of possessing them is for ornament. In *Burghart* v. *Angerstein* (3), Alderson, B., directed a jury that an eleven-guinea waistcoat could not be necessary; yet a waistcoat is a useful article. The high price shewed it to have been bought not for ordinary wear but for show.

[KELLY, C.B. No doubt there are many things which may be pronounced at once not necessaries. But do these extreme cases change a question of fact into one of law? Where an article can serve a useful purpose, is not its necessity always, no matter how expensive the article may be, a question of fact for the jury, under the judge's direction, to determine?]

Not where the true character of the article is luxurious. In olden times the courts decided whether articles were "necessaries," even on demurrer: *Mackarell* v. *Bachelor*. (4)

[CHANNELL, B. Can an article be said to be "useful" merely because it may be used? That has been assumed to be the test.]

The word "useful" must, for the present purpose, be limited to things in which ornament is subsidiary to utility.

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goods were necessaries to a person in the condition in life of the defendant, and that they were necessaries.

H. T. Cole, in support of the rule, was not called on.

The Court were of opinion that unless special circumstances were shewn, cigars and tobacco were not necessaries to any infant, and that the learned judge should have so ruled at the trial.

Rule absolute.

(1) 5 Q. B. 606, 612.

(2) 11 M. & W. 67.

(3) 6 C. & P. 690.

(4) Cro. Eliz. 583.

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[BRAMWELL, B. Your meaning might be expressed thus:—Where utility is ancillary to luxury, the article is luxurious; where luxury is ancillary to utility the article is useful.]

Adopting that definition, the solitaires are clearly not necessaries. As to the goblet, which was intended for a present, that cannot be necessary. It is less necessary for an infant, whatever his station may be, to make presents than to subscribe to charitable institutions; but such subscriptions could not be necessaries: per Alderson, B., in *Chapple* v. *Cooper*. (1)

Secondly, the evidence tendered was improperly rejected. The plaintiff's knowledge or ignorance of the fact that the defendant was already supplied with jewelry is immaterial. In *Burghart* v. *Angerstein* (2), other tradesmen's bills for similar articles to those sued for were allowed to be looked at. In *Renaux* v. *Teakle* (3), evidence was admitted that a wife had purchased various articles of dress of different tradesmen (though not to the knowledge of the plaintiff), in order to rebut the presumption, arising out of cohabitation, of an implied authority to contract for necessary clothing. How can a tradesman's ignorance of the fact that an article is not necessary make it necessary?

[BRAMWELL, B., remarked that in *Dalton* v. *Gib* (4) the judges appear to have thought that, generally speaking, it would be the duty of a tradesman supplying an infant with necessaries to make inquiries as to whether he was already sufficiently supplied.]

Here there were no special circumstances to relieve him from that duty, but much to put him upon inquiry.

Cur. adv. vult.

January 30, 1868. The Court differing in opinion, the following judgments were delivered:—

BRAMWELL, B. In this case, on a replication to a plea of infancy, the jury have found two articles to have been necessaries for the defendant. The articles are, a gold drinking cup, the price of which is 15*l.* 15*s.*, and a pair of things called "solitaires," explained to us to mean articles which may be used as studs to fasten the wristbands of a shirt. The price of these solitaires is

(1) 13 M. & W. at p. 258.

(2) 6 C. & P. 690.

3 ~~(3) 8~~ Exch. 680, 17 Jur 331, Ex

(4) 5 Bing. N. C. 198.

25*l.*, owing to their costly material and manufacture, and the jewels with which they are adorned. I believe I am right in saying that studs fit for the purpose, and such as a gentleman may well wear, might be bought for a trifle, or the wristbands may be buttoned with buttons, scores of which may be bought for a few pence. It was said that the question was for the jury, that the rule is that where the article is one of an useful class, the question is one of fact to be decided by them. This argument was principally used in favour of the claim for the solitaires. I cannot agree to this. It is extremely difficult to name anything which cannot be put to some use. Ear-rings for a male, spectacles for a blind person, a wild animal, might be suggested. But even they might come within the argument in support of the drinking cup claim, viz., that they might be used for necessary and becoming presents. The argument seems to me to lead to an absurdity. Food is necessary; is it a question of fact, whether a daily dinner of turtle and venison for a month, is a necessary for a clerk with a salary of 1*l.* a week? A threepenny ride in an omnibus on a wet day may be a necessary for such a clerk, and save him its cost by saving his clothes. Is whether a coach and four is a necessary for him, a question of fact? Besides, suppose a jury ask what is the meaning of necessaries. Does it mean in law, as in strictness, something indispensable? The answer must be, no. Then when they ask what is the meaning, and it is expounded to them as being something reasonably required for the nourishment, clothing, lodging, education, and decent behaviour and appearance, according to station, how can such an explanation include these articles?

But I may fairly be asked what is the rule? It seems to me to be this. There are some things which cannot be necessaries. The ear-rings, the spectacles in the cases put, the wild animal, and all things which are useless except for amusement, or where the utility is the subordinate consideration and the ornament or amusement the principal. On the other hand, there are some things certainly necessaries, bread, meat, vegetables, water. There are also things which may or may not be, and which give rise to questions for a jury. For instance, an infant orders an expensive coat; but it appears his trade or calling is of that nature that such a coat is necessary for his health; or it is shewn that a coat at half the price would not last half the time. Or if he has ordered a broadcloth coat, and it is said he should have contented himself with fustian, evidence may be given as to his position, and as to how such people dress in that class in that neighbourhood, and then the question is for the jury. I am far from saying that the above is at once accurate and exhaustive, but I forbear from the attempt to make it so. Not to be more tedious, I think, therefore, that in this case the jury should have been told to find for the defendant. If the argument as to the drinking cup is right, and if the tradesman is bound to make no inquiry, why every case is for the jury, as an infant may always have some friend to whom he would like to give the useless article he has purchased. But I cannot see why that argument should be used. An infant must drink, and drink out of some vessel; therefore, the gold cup is in the class of useful articles. If the question was for the jury, still I think such a direction ought to have been given as would have precluded their going wrong, unless they gave a perverse verdict. I think necessaries ought to have been so defined and explained as to give them no opportunity of returning a wrong verdict, unless they did so wilfully. Of course, with this opinion I think if there was evidence to go to the jury, still the verdict was wrong, and there should be a new trial. It is observable that no one pledged his oath that these things were necessary, or gave any description of the articles (1), of their utility, of the cost of other contrivances for the purpose.

Further, I think evidence was admissible to shew that the defendant was supplied with similar articles. Suppose a baker delivered 100 loaves daily to an infant, who could only consume one, would he be liable for the price of the other 99? Certainly not; because they were not necessaries. But what difference does it make on this question, that they are supplied by one baker or a hundred? The question is like that which arises where a married woman has dealt on credit. There it is a question of authority, here of capacity, depending on whether the woman or infant is sufficiently supplied. No doubt we are not concerned with the goodness or badness of the law, but I cannot help thinking it would be more correctly administered by juries, at least, on this head, if its reason and advantages were properly appreciated. It is not a law for the indemnity and defence of the infant who is sued merely; it is a law to deter people from trusting infants, and so save them from the consequences of the improvidence and inexperience natural to their age, an improvidence which would lead them into loss though all their dealings were with honest people, an inexperience which causes them to be no match for rogues. Modern legislation runs in the same direction of protecting the helpless and invalidating contracts from which they have not the sense or power to protect themselves. I think our judgment should be to enter a verdict for the defendant; if not, to order a new trial: and, in conformity with the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125,) s. 44, the wrong verdict being no fault of the defendant, without costs.

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(1) A pair of solitaires, said to exactly resemble those purchased by the defendant, were produced by the plaintiff at the trial.

Kelly, C.B. In the conclusions contained in the judgment I am about to read, my Brothers Channell and Pigott concur: but for the reasons on which those conclusions are founded, I am solely responsible. This action is brought to recover the price of several articles of jewelry supplied by the plaintiff, a jeweller in Bond Street, to the defendant, who at the time of the purchase was an infant. The price of three items was paid into court, and admitted to be sufficient. The question as to the remainder was, whether they were necessaries suitable to the estate and condition of the defendant, and that question was left upon each separate item to the jury, with leave reserved to move upon all or any to enter a nonsuit, or reduce the verdict. The jury found for the defendant upon two articles, and upon the remaining two, a pair of shirt buttons highly ornamented at the price of 25*l.*, and a silver gilt cup at 15 guineas, there was a verdict for the plaintiff. The defendant was the younger son of a baronet, and entitled in his own right, during his minority, to an income of 500*l.* a year, and to 20,000*l.* on coming of age. He had no fixed residence, but when in London was boarded and lodged gratuitously by his mother, and when in the country by his brother, the present baronet. He, nevertheless, sometimes frequented an hotel in Bond Street. He was 19 years of age, and mixed with the highest society. A rule has been obtained for a nonsuit, on the ground that neither of these two articles could be deemed necessaries, and that I ought not to have left any question to the jury, but should have held as matter of law that these articles were not necessaries, and directed a verdict for the defendant.

And first as to the shirt buttons, was the judge bound to hold that these things were not necessaries, and so direct the jury? This case involves the very important question whether, under any circumstances, it is competent to the judge to determine, as matter of law, whether particular articles are or are not to be deemed necessaries suitable to the estate and condition of an infant; and whether if, in any case, the judge may so determine, his jurisdiction is not limited to those cases in which it is clear and obvious that the articles in question not merely *are* not but *cannot be* necessaries to any one of any rank, or fortune, or condition whatever? We cannot separate the term "necessaries" from its legal adjunct, "suitable to the estate and condition of the infant;" and as the effect of these latter words involves a number of considerations, such as the age of the infant, his income and his rank, his profession or calling, if he belongs to any profession, or has any duties or occupations in life, it seems contrary to all legal principles to hold that these are all matters of law, and not within the province of a jury to decide. In *Peters* v. *Fleming* (1), Parke, B., observes, that "it is perfectly clear that from the earliest times down to the present, the word 'necessaries' was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is." It should seem, therefore, that as in all cases these several considerations arise upon the question what are or are not necessaries, it is impossible to determine such a question upon any fixed, and definite, and legal principle, but that each case should be left to a jury with the observations, and, if necessary, such admonitions and cautions on the part of the judge, as the particular circumstances proved may render just and appropriate. It is true that in ancient times the judges have taken upon themselves to determine this question as matter of law, and even upon demurrer; but

(1) 6 M. & W. at p. 46.

in the altered state and condition of society which has now existed for many generations, we find but two cases in which it has been judicially held that this question should be withdrawn from a jury. In *Brooker* v. *Scott* (1), in an action for 7*l.* 0*s.* 5*d.* for dinners and desserts furnished to an undergraduate at Cambridge, whose meals were supplied by the college in which it was his duty to dine, the Court of Exchequer directed a nonsuit to be entered; and in *Bryant* v. *Richardson* (2), the same court determined as matter of law that cigars were not necessaries, and an opinion was expressed by more than one judge, that my Brother Bramwell, who had tried the cause, ought to have nonsuited the plaintiff. It will be observed, however, that in both these cases it was obvious that the articles supplied could not be necessaries. Dinners to a young man in his lodgings, who was supplied with his meals by his college, could not be necessary; and it is equally clear that cigars made of tobacco cannot be necessary to any man of any condition, unless in the one case or the other the health of the infant should require the indulgence. On the other hand it has been held in a great variety of cases by every court in Westminster Hall, that the question of necessaries was for a jury. In *Maddox* v. *Miller* (3), Lord Ellenborough and the Court of King's Bench directed a new trial, where Bayley, J., had nonsuited the plaintiff in an action against the son of a clergyman, who had a numerous family and a very moderate income, upon a tailor's bill for clothes which seemed to be beyond what was necessary. In *Chapple* v. *Cooper* (4), it was held that it was for a jury to determine whether an infant widow was liable for the expenses of the funeral of her husband, though he had left no property behind him, and a verdict found for the plaintiff was sustained by the Court. In *Harrison* v. *Fane* (5), where an action was brought for the hire of horses and gigs, against a student at Oxford, the judge who tried the cause and the Court of Common Pleas, held that the question of necessaries was for a jury; Tindal, C.J., observing, although of opinion that the verdict was wrong and should be set aside, that "it was a question of fact for the jury, subject to the control of the

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(1) 11 M. & W. 67.

(2) *Ante* Note, p. 93.

(3) 1 M. & S. 738.

(4) 13 M. & W. 252.

(5) 1 M. & G. 550.

Court, as to the manner in which the jury had exercised their discretion." In *Burghart* v. *Angerstein* (1), in an action upon a tailor's bill, obviously most extravagant in quality and quantity, the whole question of necessaries was left by Alderson, B., to the jury; and, in *Peters* v. *Fleming* (2), where the plaintiff had obtained a verdict for the price of a quantity of jewelry, including a fine gold ring and three other rings, a gold watch and gold pins, the Court of Exchequer refused to disturb the verdict, Alderson, B., observing that the real question was, whether or not what the infant had contracted for was such as a person in his station and rank in life would require, and whether the articles were ornaments or for real use, in which latter case they must be necessaries, provided they were suitable to the infant's age, station, and degree. The jury must say whether they are such as reasonable persons of the age and station of the infant would require for real use.

The articles in question here, a pair of shirt buttons, is certainly a part of the necessary apparel of a gentleman, and as shirt buttons may be obtained at almost any price from a very small to a very large amount, I think, upon the authority of these cases, that it is for a jury and for a jury alone to determine the price at which, in each particular case, they may be considered suitable to the estate and condition of the infant, and consequently that, if the judge has power in any case to nonsuit, in this case the matter was properly submitted to the jury.

We have next to consider whether the verdict is against the weight of evidence, and ought to be set aside. The price was, no doubt, very large, and the Court might be better satisfied if the verdict had been given the other way. But is this sum so excessive for a young man to contract for who has 500*l.* a year to spend, and nothing else to spend it upon but his dress and other personal expenses, or the luxury of a horse and groom? Clothing as well as food is undoubtedly among the first necessaries of life, and it seems to me that the description of clothing suitable to the condition of a young man under age, whether the articles be a coat or shirt, or a pair of shirt buttons, is peculiarly a question for a jury. The appropriate clothing for a man ranges from a smock frock worth half a crown for a labourer at 12*s.* a week, to a dress-coat

(1) 6 C. & P. 690.

(2) 6 M. & W. 42.

embroidered with gold lace and of great value for a gentleman in the diplomatic service. How can we apply a legal test to the price at which a tradesman is entitled or not entitled to recover? I agree in a remark which fell from my Brother Bramwell during the argument, that it is not because a judge is unable to draw the line between a pound and a guinea for a gold pin, or between four guineas and five for a coat, that he may not say that twenty guineas is too much for the one or the other. But surely this is in all cases a question, not for a judge at all, but for a jury; and if a jury have found that 25*l.* is not an excessive sum for an article of dress for a young man circumstanced like the defendant, unless we are prepared to determine ourselves what is the sum beyond which the articles must be disallowed, which would be to usurp the functions of a jury, I think we ought not to interfere with their verdict, except, indeed, where the price is so glaringly excessive that it is impossible to hold it suitable to any rank in life or any fortune. A gold shirt-pin and a gold watch-chain are no more necessary to a young gentleman than a pair of ornamented shirt buttons; a metal pin and a watch-ribbon and shirt buttons of mother-of-pearl or plated metal would equally suffice. Yet this Court has held, that the verdict of a jury that a gold pin and a gold watch-chain and several gold rings were necessary ought not to be disturbed. I think, therefore, that the Court is not at liberty to determine, as matter of law, that these shirt buttons were not necessaries; and further—but, in this, speaking for myself only—that the verdict ought to stand.

With respect to the cup, however natural and proper it may be for a young gentleman circumstanced like the defendant, to make a small present to a nobleman whose hospitality he enjoys upon a long visit at a country house, I think, on the whole, that upon this item the verdict should be set aside; and although if this were a court of error I should not hesitate to declare my opinion to be that a judge is in no case entitled to withdraw the question of necessaries from a jury, I do not feel myself at liberty sitting here to overrule the case of *Brooker* v. *Scott* (1), supported as it is by *Bryant* v. *Richardson* (2); and, as the majority of the Court are of opinion that the verdict should be reduced by the sum of fifteen guineas, I do not dissent from a rule to that effect.

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(1) 11 M. & W. 67.

(2) Ante Note, p. 93.

An objection was made by the defendant that evidence of his having purchased other articles of jewelry to a large amount of other jewellers so as to render the supply by the plaintiff unnecessary, was improperly rejected. But as the purchase or possession of these articles by the defendant was unknown to the plaintiff, who had no means of ascertaining what articles of jewelry the defendant might have obtained from other tradesmen, or from any one else, I thought, and still think, that if the articles supplied by the plaintiff were necessaries, it would be alike contrary to common sense and to justice to deprive him of his right to be paid for them. If the law be otherwise, a tailor could not recover for a coat, if it turned out that, unknown to him, the infant had another coat in his wardrobe at home.

The rule therefore must be made absolute for reducing the verdict by fifteen guineas, and discharged as to the residue, or, if the defendant think fit to accept it, the rule may be made absolute for a new trial, but upon payment of costs; and in this conclusion my Brother Channell and my Brother Pigott concur.

CHANNELL, B. I am also of opinion that it was not competent to the Lord Chief Baron to withdraw the question in this case from the jury. But I think there should be a new trial, upon payment of costs, not however on the ground of misdirection, or improper rejection of evidence, but because the verdict was against the weight of the evidence.

PIGOTT, B. I agree in thinking that the Lord Chief Baron was right in leaving the question to the jury. At the same time, as Tindal, C.J., observed in *Harrison* v. *Fane* (1), although it is for the jury to say as a question of fact whether particular articles are necessaries, their finding is to be "subject to the control of the Court, as to the manner in which they have exercised their discretion." It seems an anomaly to say that a judge may not withdraw the matter entirely from the jury, and yet that the Court may review their finding. Still, on the authorities, such seems to be the

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(1) 1 M. & G. 550, at p 553.

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law. With regard to the new trial, I think that we ought to grant it on the ground that the verdict was against the evidence. I have some hesitation in coming to the conclusion that the defendant should pay the costs, but, under all the circumstances, I agree that he should do so.

Rule accordingly.

Attorney for plaintiff: *Edmund F. Davis.*
Attorney for defendant: *Henry Tyrrell.*

Feb. 8.

[IN THE EXCHEQUER CHAMBER.]

MERCER *v.* PETERSON.

Bill of Sale—Agreement to give Bill—Fraudulent Preference—Act of Bankruptcy—Bankruptcy Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 67.

5 Ch 579. 582
6 QB 81
6 CP. 110, 5-6
7 Ch 641-2-2
14 Eq 591
9 Ch 275
2 CCR 111
1 Ex D. 62-4
9 Ch D. 260-4
4 Ch D 683
10 Ch D 323
13 Ch D. 247
248, 250-1
23 Ch D 642

A trader, being indebted to the defendant, gave his acceptance to him for the amount of the debt. Three days before the acceptance was due he agreed to give the defendant a bill of sale on all his effects and stock-in-trade, in consideration of the defendant taking up the acceptance, and to cover any further advance which might be made to him by the defendant. The defendant accordingly took up the acceptance, and afterwards lent an additional sum of 64*l.* to the trader, upon the understanding that it should be included in the bill of sale. A bill of sale was subsequently executed in pursuance of the agreement, whereby the whole of the trader's personal estate, of which he was then or should in future become possessed, was assigned to the defendant, as security for the debt due from the trader to him. The trader's property was worth about 115*l.* Less than twelve months from the date of this bill of sale, but more than twelve months from the ageeement to give it, the trader became bankrupt. In an action of trover by his assignee in bankruptcy against the defendant for the goods included in the bill of sale, some of which had been acquired after the agreement:—

Held (affirming the judgment of the Court below), that the sum of 64*l.* was a fair present equivalent for the assignment by the trader of his goods, and that the bill of sale, therefore, conferred on the defendant a good title to them as against the plaintiff.

APPEAL by the plaintiff from the judgment of the Court of Exchequer, making absolute a rule to enter a verdict for the defendant. (1)

Macnamara, for the plaintiff, relied on the arguments used and cases cited by him in the Court below, and also urged that the advance of 64*l.* between the time of the giving of the agreement and the making of the bill of sale, was not a fair present equivalent for the assignment by the debtor of his property, which was worth 115*l.* With reference to the judgment of Martin, B. (1), which appeared to be based on the supposition that the bill of sale must be referred back *in date* to the day of the agreement, he contended that the agreement could only be looked at to ascertain the trader's intention, and that on the point of time the actual date of the bill itself could alone be looked at. The agreement could not in itself be an act of bankruptcy. *Ex parte Taylor* (2); Millar and Collier on Bills of Sale, 2nd edition, p. 180; Shelford on Bankruptcy, p. 137. He also cited *Hassells* v. *Simpson* (3); *Woodhouse* v. *Murray* (4); *Macnee* v. *Gorst.* (5)

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(1) Law Rep. 2 Ex. 304, where the facts are stated.

Dowdeswell, Q.C. (*Jelf* with him), for the defendant, was not called on.

COCKBURN, C.J. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. But we do not base our decision on the ground taken by one of the learned judges in the Court below, namely that the bill was to be carried back in date to the agreement which was more than twelve months before the bankruptcy, and that the time, therefore, within which it would have been void under the bankrupt laws, had run out. An agreement to give a bill of sale is not and cannot be an act of bankruptcy. It is then to the date of the bill of sale itself that we must have regard, and the question is whether, although primâ facie void as against the assignee, it can be sustained. The cases decide that, generally speaking, an assignment by a trader of his whole property for a past debt is an act of bankruptcy, because the result must inevitably be to defeat and delay his creditors. Now here there was first an agreement made on the 9th of December, 1865, whereby, in consideration of the defendant's taking up a bill of exchange, the trader promised to assign to him the whole of his effects. But even at that time the parties seem to have been contemplating a further advance, although there was no stipulation

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(1) Law Rep. 2 Ex. at p. 309.
(2) 5 De G. M. & G. 392.
(3) 1 Dougl. 89 (n).
(4) Law Rep. 2 Q. B. 634. Affd. 4 L. 77 l. Ch.
(5) Law Rep. 4 Eq. 315, per Wood, V.C., at p. 322.

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then that it should be made, and therefore no obligation on the defendant's part to make it. In the interval, however, between the date of the agreement and the giving of the bill of sale, a further advance was arranged for, and actually made, upon the understanding that it was "to be included in the bill." Now, in order to see what the real consideration for the giving of the bill was, we are not confined to the bill itself; and here the consideration may well have been partly the original agreement, and partly the further advance. The bill, therefore, may be said to have been given on a twofold consideration, the one past, the other present or future. And it has been held that where a trader assigns his whole property, but receives in return a *fair equivalent*, the transaction is not void under the bankrupt laws. It is too late to question the propriety of the decisions to that effect, although I fear that where a trader makes over his whole estate, even for a fair equivalent, and even though he really have a bonâ fide intention of going on with his business, in the end the present advance is too often dissipated, and the creditors receive no benefit from it.

1 Ch.D. 64.

9 Ch.D 264

The simple question then is, whether the sum of 64*l.* can be considered an equivalent for the transfer of the trader's property? The effects we may take to have been worth 115*l.*, and even if the 64*l.* were the sole consideration, I think we should be justified in holding it to have been a substantial consideration sufficient to support the subsequent transaction. There is nothing in this case to negative the proposition—on the contrary, there is much to affirm it—that the trader obtained a fair present equivalent for the bill.

With regard to the 21*l.* (the value of the property acquired after the 9th of December, 1865), it is contended that although the bill of sale may cover everything belonging to the trader at the date of the agreement, it will not have any operation over after-acquired property. But if we are to look, as I think we are, to the date of the bill, and not to that of the agreement, there is nothing to shew that this property was not acquired in the interval, and no reason, therefore, why the bill of sale should not include it. Under these circumstances, we are all of opinion that the judgment below ought to be affirmed.

WILLES, BLACKBURN, KEATING, MELLOR, and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *J. H. F. Lewis, for Wilkes, Gloucester.*

Attorneys for defendant: *Cree & Last, for Edmund Edmonds, Gloucester.*

HARDY *v.* VEASEY AND OTHERS.

Jan. 24.

Banker—Customer—Disclosing Customer's Account—Justifiable occasion.

In an action by a customer against his banker for disclosing the state of the customer's account without justifiable cause, the question was left to the jury whether under the circumstances it was reasonable and proper to make such disclosure:—

Held that, assuming the existence of a legal duty on a banker not to disclose his customer's account, except upon a reasonable and proper occasion, the question of whether the disclosure was made on such an occasion was rightly left to the jury.

Quære, whether by virtue of the relation of banker and customer, any legal duty is imposed on the banker not to disclose his customer's account, except upon a reasonable and proper occasion, so as to give a cause of action without special damage; or whether the banker's duty is not merely a duty not to act to the prejudice of his customer, requiring special damage to make a breach of the duty actionable.

Foster v. *Bank of London* (3 F. & F. 214) considered.

ACTION against the defendants as bankers.

The first and second counts of the declaration were for not honouring the plaintiff's cheques; upon these no question arose.

The third count was as follows: "That the defendants being such bankers as aforesaid, and the plaintiff being a trader and subject to the English bankrupt laws, in consideration that the plaintiff would become a customer of the defendants as such bankers, and open and keep a current account with them as such bankers, the defendants promised the plaintiff that they would not at any time during the currency of such account publish or communicate to any other person the state of such current account; and the plaintiff afterwards became such customer of and opened and kept such account with the defendants as such bankers, and all things happened necessary to entitle the plaintiff to have the promises fulfilled by the defendants, and nothing happened to disentitle the plaintiff, or exonerate the defendants therefrom;

yet the defendants afterwards, and whilst the plaintiff kept such current account with them as such bankers, did publish and communicate to other persons the state of the plaintiff's then current account with them as such bankers, whereby the plaintiff suffered the damage and injury in the first count mentioned."

To this count the defendants pleaded: 1. A denial of the promise. 2. A denial of the breach. 3. Leave and licence. Issues thereon.

It appeared on the trial before Byles, J., at the Cambridge summer assizes, 1867, that on the 24th of December, 1866, the plaintiff had an overdrawn account at the defendants' bank, and that the defendants had in their hands certain cheques of the plaintiff's, which there were no assets to meet; the defendants' manager, Wise, communicated with the plaintiff, who promised before the evening of that day to pay in to his account a certain sum of money which he expected to take on the market; on the strength of this promise, the manager paid some further cheques presented during the day, but the plaintiff failed to pay in so large a sum as he had led the manager to expect, or such a sum as was sufficient to meet the outstanding cheques; and in the evening of the day the manager, without the plaintiff's authority, communicated to one Mutton, a money-lender of the neighbourhood, the state of the account, with the view of obtaining assistance for the plaintiff.

At the close of the plaintiff's case counsel for the defendants submitted, on the authority of *Tassell* v. *Cooper* (1), that no such absolute duty as that charged in the declaration was implied by law from the relation of banker and customer, and that it was not proved in fact; but the learned judge permitted an amendment stating the promise as one not to disclose *except on a reasonable and proper occasion.* No express contract to that effect was proved, and the plaintiff was about to call evidence in support of the custom not to disclose except upon a reasonable and proper occasion, but on the learned judge's intimation of opinion that it was unnecessary, the evidence was not given. (2)

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(1) 9 C. B. 509.

(2) The learned judge in reference to this said: "I presume the defendants would not be disposed to deny, that if a customer overdraws his account, the banker must not go into the market-

The learned judge then stated that the question for the jury on the third count would be, "Whether the communication to Mutton of the state of the plaintiff's account was an officious and unjustifiable one." And he added, "If it was made with a reasonable hope and an honest intention of getting assistance for the plaintiff, I should doubt whether the action is maintainable."

The case for the defence was then gone into, and the jury, after hearing the evidence and without requiring the judge to sum up, returned a verdict for the defendants.

Bulwer, Q.C., in Michaelmas Term last, obtained a rule for a new trial, on the ground that the learned judge misdirected the jury in telling them that if the communication of the state of the plaintiff's account to Mutton was made by Wise with a reasonable hope and an honest intention of getting assistance for the plaintiff, the action was not maintainable; and also in that he ought to have directed the jury to find for the plaintiff upon the third count, and to have directed them that the communication by Wise to Mutton of the state of the plaintiff's account was unauthorized; and on the ground that the verdict was against evidence. He cited *Foster* v. *Bank of London.* (1)

Jan. 18, 24. *O'Malley, Q.C.*, *Keane, Q.C.*, and *D. Brown*, shewed

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place and publish it, or tell anybody who has no interest to hear it. I am now speaking of men in trade. That, I think, would be clear enough. If there is a justifiable occasion, then he may. I suppose that will not be disputed by the plaintiff."

(1) 3 F. & F. 214. The declaration in that case laid the duty, as a duty not to disclose the state of the plaintiff's account with the defendants without the plaintiff's consent. The breach, which stated special damage, set out the following facts, which were proved. Another customer of the defendants had presented to them for payment a bill of the plaintiff's, payable at their bank, and, the assets being insufficient, they had, at the request of the holder of the bill, informed him of the amount of the insufficiency, and so enabled him, by paying in a small sum to the plaintiff's account, to obtain payment of the bill. At the trial at Guildhall, before Erle, C.J., it was argued for the defendants that the bankers were at liberty, when a cheque was presented, to say, "not enough to meet it by such a sum;" but Erle, C.J., said the banker could not go further than say "not sufficient assets." The jury, expressing themselves to the same effect, Erle, C.J., said, "that is, the jury are of opinion that it is the duty of a banker in no way to disclose the state of his customer's account?" The jury said they were. Erle, C.J., said he was not aware of any law *against* that; and on that finding the verdict must be for the plaintiff, with leave to move. No motion was made.

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cause. They contended that there was no such legal duty as that alleged in the declaration; that the duty not to disclose the customer's account, except on proper occasions, was only a moral duty, and stood on the same footing as the duty not to disclose except on certain specified occasions, which was negatived as legally binding in *Tassell* v. *Cooper* (1); and that the observations of Erle, C.J., in *Foster* v. *Bank of London* (2), when taken in connection with the facts of that case, neither stated nor countenanced any such legal obligation. They further contended that there was no fiduciary relation whatever between a banker and his customer, but only the relation of a borrower and a lender of money: *Foley* v. *Hill* (3); *Devaynes* v. *Noble* (4); *Pott* v. *Clegg* (5); and that, even if at any time the relation of banker and customer bore a fiduciary character, that relation, so far, at least, as its fiduciary character was concerned, was put an end to when the customer's account was overdrawn. In any case there was no misdirection, and the verdict was not against evidence.

Bulwer, Q.C., and *Cockerell,* in support of the rule, contended that the case of *Foster* v. *Bank of London* (2), and the observations of Erle, C.J., were inconsistent with the idea that no such legal duty existed as that alleged, and that such a duty was almost necessarily and by universal custom annexed to the relation; that if such a duty existed at any time, it must exist none the less (and on the ground of practical convenience ought to exist rather the more) from the fact of the account being overdrawn: since the very cases cited shewed that so far as the mere question of indebtedness was concerned, there was no peculiarity in the case of banker and customer; the peculiar relation and duty, therefore, could not depend on which way the balance turned, but subsisted so long as the accounts were open between the parties.

[CHANNELL, B. Does not the case resemble that of an attorney and his client? and is there any authority for an action by a client against his attorney for breach of confidence?]

Probably such an action could be maintained. (6) They further

(1) 9 C. B. 509.

(2) 3 F. & F. 214.

(3) 2 H. L. C. 28.

(4) 1 Mer. at p. 541.

(5) 16 M. & W. 321.

(6) See *Taylor* v. *Blacklow*, 3 Bing. N. C. 235.

contended that, assuming the duty to exist as alleged, it was for the jury to determine whether the communication was a justifiable one; but that the learned judge's words to the effect that, if it was made with an honest intention of assisting the plaintiff, no action lay, amounted to a direction to them to determine the question on that fact alone. But the direction was erroneous, for the motive was immaterial; in the absence of the plaintiff's authority, there must, as in privilege for libel, be something amounting to a moral duty to make the communication, in order to justify it. They also contended that the verdict was against evidence.

KELLY, C.B. We are not called on in this case to decide the question, whether a legal duty is imposed on bankers to keep reasonably secret the state of their customers' accounts; that is a question well worthy of consideration, and upon which I will express no opinion. No doubt cases have been presented to us which have a somewhat contrary tendency, but it is not pretended that the negative has ever been decided by a superior court of law; and though it may be thought that such a duty is rather moral than legal, I should hesitate much before setting aside the opinion expressed by the late chief justice of the Common Pleas in the case of *Foster* v. *Bank of London*. (1) It is impossible to reconcile his language in that case with a total absence of any such legal duty, for undoubtedly he there allowed an action to be maintained by a customer against his bankers which could not possibly have lain if no such obligation existed. If, however, there be such a duty, it would seem to follow that on similar principles a like duty must be imposed on an attorney; yet it has not been shewn that any action for the breach of such a duty has ever been brought against an attorney, nor has any authority been cited in favour of such a proposition. (2)

But here the question left to the jury was, assuming such a relation to have existed between the parties as that it would have been a violation of duty in the defendants to disclose the plaintiff's account, except on a reasonable and proper occasion, was there here a reasonable and proper occasion for the disclosure?

(1) 3 F. & F. 214.

(2) See *Taylor* v. *Blacklow*, 3 Bing. N. C. 235.

The jury have found that there was. The complaint is, that, in expressing to the jury his opinion, that if the communication was made with a reasonable hope and honest intention of assisting the plaintiff, no action would lie, the learned judge was guilty of a misdirection; but I do not read his words as withdrawing from the jury the general question of whether the occasion was a justifiable one. He did not, indeed, in express words leave it to them; but, taking into consideration all that passed, and that after the remark of the learned judge the counsel for the defendants addressed the jury, and urged on them that the circumstances were such as to make the communication justifiable, and that the plaintiff's counsel then addressed them in the contrary sense, it is reasonable to infer that the question in fact submitted to them was whether, assuming the relation and duty alleged to exist, the communication was not, under the whole circumstances of the case, justified; and that question is the very question which the plaintiff contends ought to have been put. The rule must, therefore, be discharged.

MARTIN, B. I am of the same opinion. I also should be sorry on the present occasion to pronounce an opinion, whether or not the law will imply a contract by a banker not to communicate the state of his customer's account except on a reasonable and proper occasion. There may be such a duty, but I confess I should like to see some authority in its support. It is one thing to be under a moral duty to do a thing, another to be bound by a contract. If the latter were made out, then the banker would be instantly liable for nominal damages on making the communication, though no injury whatever resulted. But if, from the relation between the banker and his customer, a duty is implied in the former, not to do any act to the damage of his customer, the position would be much easier to understand.

I am not inclined to give an opinion on either point, but should be glad to be directed to an authority. As to the case of *Foster* v. *Bank of London* (1), there was an obvious conspiracy between the bank and one customer to give him an advantage over the other creditors of the plaintiff, who was also a customer. In *Tassell* v. *Cooper* (2), on the other hand, the judges of the Common Pleas, especially Mr. Justice Williams, incline against any such duty as is alleged.

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(1) 3 F. & F. 214.

(2) 9 C. B. 509.

Here, however, it is pretty clear that there was no misdirection. The words of the learned judge express very much what is in my own mind, though I will pronounce no opinion on the question; but it is clear that the jury had the whole matter before them, and that they have made up their minds upon the point of whether or not the occasion was justifiable. There has been no misdirection and no wrong verdict.

CHANNELL, B. We must take the third count, as amended, to state a duty in the defendants not to disclose the state of the plaintiff's account, except on a reasonable and proper occasion, and to lay a corresponding breach; and we must also take the defendants to have traversed this breach. I do not agree with the argument that, because the plaintiff's account was overdrawn, he had therefore ceased to be a customer. Assuming, then, the relation to have still existed, and assuming the duty to exist, it was a question of fact for the jury whether or not the communication was made on a reasonable and proper occasion; the jury have found that it was so made, and the learned judge is not dissatisfied with their verdict. I can see no misdirection in the manner in which the question was left to them, and their finding seems to be warranted by the evidence. The case cited of *Foster* v. *Bank of London* (1), seems correct; and if the observations of the chief justice are taken in connection with the facts of that case, there is no ground to complain of them, but they do not, I think, support the plaintiff's argument. It was not so much there the case of a disclosure of the customer's account, as of a trick, by which the bank conspired with one of the plaintiff's creditors to the prejudice of the rest; and the language of the chief justice is guarded, for he says emphatically that he knows no law *against* the action being maintainable.

Rule discharged.

Attorney for plaintiff: *T. Martin, for F. R. Coote, St. Ives, Hunts.*

Attorneys for defendants: *Fox & Robinson, for Hunnybun, Huntingdon.*

(1) 3 F. & F. 214.

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Jan. 30.

WILSON *v.* THE MAYOR AND CORPORATION OF HALIFAX.

Negligence—Public Duty—Local Board—Construction—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 83—*Public Health Act,* 1848 (11 & 12 *Vict. c.* 63), *ss.* 68, 139—*Notice of Action.*

5 QB 223,
9 CP 76, 81
86,
— 319,
4 CP Cas
259
1 QBD 792

The defendants, a local board, left unfenced a goit adjoining a public footpath within their district, by reason of which the plaintiff's husband, while using the footpath, fell into the goit and was drowned:—

Held, that the defendants were not liable under s. 83 of the Towns Improvement Clauses Act, 1847, as the goit was not a *hole* within the meaning of that section (which refers to holes caused in the construction and repair of houses, &c.); nor under s. 68 of the Public Health Act, 1848, since that section only gives a discretionary power to the local board to place and keep in repair fences, &c., and does not impose upon them an absolute duty to do so.

Quære, whether, supposing any such duty to have been imposed on the defendants by s. 68 of the Public Health Act, 1848, they would have been liable to an action for neglecting it.

Held, also, that under s. 139 of the Public Health Act, 1848, the defendants were entitled to notice of action; the alleged cause of action being the continued non-performance of a duty imposed upon them by the Act, and therefore a thing "done or intended to be done" under the provisions of the Act, within the meaning of that section.

Action by an administratrix under Lord Campbell's Act.

The first count of the declaration stated that there was (at the time when, &c.) within the borough and district of Halifax, "a certain goit, hole, or place, near to a certain street" within the borough and district, which was "for want of sufficient repair, protection, and inclosure, dangerous to passengers along the street," and that it thereupon became the duty of the defendants, as the Local Board of Health of Halifax, "under and by virtue of the statutes, &c., to cause the same to be repaired, protected, or inclosed, so as to prevent the same from being dangerous to passengers," and that through their neglect in that behalf the deceased, whilst passing along the street, fell into the goit and was drowned.

The second count charged the defendants, as the Local Board of Halifax, with wrongfully neglecting to fence off, for the protection of passengers, a certain footway near to a dam or goit within the district, and wrongfully permitting the same to be and continue dangerous for foot passengers using the footway, and leaving the same without sufficient light to warn persons, whereby, &c. (1)

Plea. Not guilty by statute. Issue.

At the trial before Lush, J., at the Leeds spring assizes, 1867, it appeared that the deceased, the plaintiff's husband, was drowned through falling into an unfenced goit by the side of a public footpath on which he was walking, within the defendants' district; that by reason of the goit being unfenced, it was dangerous to passengers, and that it was not sufficiently lighted. It was objected by the defendants that, if liable at all, they were entitled to notice of action under s. 139 of the Public Health Act, 1848; and it was conceded by the plaintiff that if they were so entitled the notice given was insufficient, for want of stating the place of abode of the intended plaintiff, or the name or place of abode of his attorney or agent, as required by that section; but it was contended that no notice of action was necessary, the cause of action being only an omission.

A verdict was entered for the plaintiff on the second count, with leave to move to enter a nonsuit or a verdict for the defendants, on the grounds—1, that a notice of action was necessary, and that no sufficient notice was given; 2, that there was no such duty upon the defendants as that upon which the second count of the declaration was founded.

A rule was obtained accordingly, and also to enter judgment for the defendants non obstante veredicto, on the ground that the second count did not shew any duty or liability on the part of the defendants.

The liability of defendants was alleged to arise in the following manner.

The corporation of Halifax were, under s. 12 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), the Local Board of Health of Halifax; and s. 68 of that act vests in the local board all present and future streets being highways within the district, and enacts, that "the said local board *shall* from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired, as and when occasion may require, and they *may* from time to time cause the soil of any such street to be raised, lowered,

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(1) There was a third count, which was abandoned at the trial.

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or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot-passengers." (1)

The Local Government Act, 1858 (21 & 22 Vict. c. 98), which (ss. 4 & 5), is to form part of the Public Health Act, 1848, and to take effect in all places where that act is in force, by s. 45 incorporates (amongst others) the provisions of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), "with respect to precautions during the construction and repair of the sewers, streets, and houses" (ss. 79—83); and by the 83rd section of that act it is enacted that, "if any building, or hole, or any other place near any street be, from want of sufficient repair, protection, or inclosure, dangerous to the passengers along such street, the commissioners *shall* cause the same to be repaired, protected, or inclosed, so as to prevent danger therefrom."

Jan. 24. *Manisty, Q.C.*, and *Gibbons*, shewed cause against the rule. The 68th section of the Public Health Act, 1848, is imperative, and the clause "they *may* from time to time . . . think fit," is parenthetical, so that the previous *shall* governs the concluding words of the section: *York and North Midland Railway Company* v. *The Queen.* (2) Again, the 83rd section of the Towns Improvement Clauses Act, 1847, is imperative, and this is a hole within the meaning of the section.

[MARTIN, B. The connection of the words and the heading under which the section occurs shew that it refers to a hole made in the course of building operations.

CHANNELL, B., referred to *Eastern Counties Railway Company* v. *Marriage.* (3)]

That no such strict construction is to be made of the sections placed respectively under the various headings, is shewn by the fact that under the heading "with respect to laying out new streets" are placed ss. 61 and 62, the operation of which is evidently not confined to that occasion, and that s. 93 is found not

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(1) Section 117, by which the local board are to be the surveyors of highways, and 24 & 25 Vict. c. 61, s. 10, by which the powers of the vestry under 5 & 6 Wm. 4, c. 50, are transferred to the local board, were also relied on by the plaintiff.

(2) 1 E. & B. 858; 22 L. J. (Q.B.) 225. 17 Jur 690

(3) 9 H. L. C. 32. 7 Jur N.S. 153

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under the head relating to the prevention of nuisances, but under that relating to cleansing the streets.

[MARTIN, B. Even supposing that construction to be correct, could any action be maintained against these defendants: *M'Kinnon* v. *Penson* (1), and *Young* v. *Davis.* (2)]

Here a special body is created with new powers and new duties, and *Hartnall* v. *Ryde Commissioners* (3) is an authority that an action will lie against them; and is also an authority for construing these sections as imperative.

[KELLY, C.B., referred to *Coe* v. *Wise.* (4)]

As to the notice of action, none was necessary; this not being a thing done, but only an omission: *King* v. *Burrell* (5); *Blanchard* v. *Bramble.* (6) In *Newton* v. *Ellis* (7), and *Poulsum* v. *Thirst* (8), something had in the first instance been done by the defendants, and the neglect was incidental to the doing; but here nothing whatever had been done, it was a bare nonfeasance.

[MARTIN, B., referred to *Davis* v. *Curling.* (9)]

There also an act had been done.

Mellish, Q.C., and *Kemplay*, supported the rule, and contended that the enactments were not imperative; that if they were so, still the defendants were not liable; and that if they were liable a notice of action was necessary; and they cited *Parsons* v. *St. Matthew's Vestry, Bethnal Green.* (10)

Cur. adv. vult.

Jan. 30. The judgment of the Court (Kelly, C.B., Martin and Channell, BB.), was delivered by

KELLY, C.B. This action is brought to recover damages against the defendants, for having permitted a public footpath, within the limits of their acts, to remain without a fence to ensure the safety of the public in passing along such footpath, whereby the

18 Jur 573.

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(1) 9 Ex. 609; 23 L. J. (M.C.) 97.
(2) 2 H. & C. 197. 10 Jur NS 79
(3) 4 B. & S. 361; 33 L. J. (Q.B.) 39. (1) See also *Ohrby* v. *Ryde Commissioners*; 5 B. & S. 743; 33 L. J. (Q.B.) 296. 10 Jur NS 1048
(4) Law Rep. 1 Q. B. 711.
(5) 12 A. & E. 460.
(6) 3 M. & S. 131.
(7) 5 E. & B. 115; 24 L. J. (Q.B.) 337. 1 Jur NS. 850
(8) Law Rep. 2 C. P. 449.
(9) 8 Q. B. 286.
(10) Law Rep. 3 C. P. 56.

(1) 10 Jur NS 257

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deceased, the husband of the plaintiff, fell into a goit by the side of the path, and was drowned.

The declaration contains three counts. The third was abandoned. The first is grounded upon the 83rd section of the statute 10 & 11 Vict. c. 34, the Towns Improvement Clauses Act, 1847; and the second upon the 68th section of the 11 & 12 Vict. c. 63, the Public Health Act, 1848. The action was brought under Lord Campbell's Act. The facts were, that there was a public footpath in the town of Halifax by the side of which a goit runs, and the path is unprotected by a fence. The plaintiff's husband fell into this goit and was drowned. The allegation in the first count is, that it was the duty of the defendants to cause the goit to be repaired, protected, and enclosed, so as to prevent danger to passengers on the footpath. It has been already said this count was framed upon the 83rd section of the 10 & 11 Vict. c. 34. We are clearly of opinion that the goit into which the deceased fell was not a "hole or other place" within the meaning of this section. The section is the last of a series beginning with the 79th, and we think the holes and places referred to in the section are holes and similar places arising or exposed during the construction and repair of the sewers, streets, and houses of the town.

The second count is founded upon the 68th section of the 11 & 12 Vict. c. 63. The cause of action alleged was that the defendants had wrongfully neglected to fence off for the protection of passengers the footway near the goit, and that thereby the deceased met his death. The 68th section vests all the streets, being highways, in the Local Board, who are in this case the defendants, and enacts that they *shall* from time to time cause the same to be repaired, and that they *may* from time to time cause the soil of the streets to be raised, &c., *and place and keep in repair fences and posts for the safety of foot passengers.* The argument for the plaintiff was that this section made it obligatory upon the defendants to place fences and posts along the footways, and an ingenious argument was presented to us, that part of this section may be read as a parenthesis. But we think, whether these words may be so read or not, that upon the true construction of the whole enactment, a discretion was necessarily vested in the board as to what fences and posts should be placed or erected in ancient footpaths where

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none had ever existed before. The supposed absolute duty of the defendants upon which the second count is framed, therefore, does not exist, and this cause of action also fails. The case of *Hartnall* v. *Ryde Commissioners* (1) was relied upon by the learned counsel for the plaintiff. The duty there alleged was created by another act of parliament, which is not obligatory upon the present defendants, and the case itself is clearly distinguishable. The duty in that case was obligatory, not discretionary. A case was cited by the learned counsel for the defendants, *Parsons* v. *St. Matthew's Vestry, Bethnal Green* (2), decided by the Court of Common Pleas, which is supposed to be somewhat at variance with the case of *Hartnall* v. *Ryde Commissioners.* (1) It does not seem to us to be necessarily so; but should a case arise in which the question shall be, whether the 68th section of the Public Health Act, 1848, imposes upon the local authority the liability to be sued in a civil action for damages, by reason of a failure to perform a duty assigned to them by the act, we should pause before we could hold that, in addition to the well established remedy by indictment, every individual among the public would have a right of action for any and every injury resulting from such breach of duty. Upon this point, however, as it does not arise in the present case, we pronounce no opinion.

5 QB 223

6 QB 215

The defendants besides contend, that they were entitled to notice of action under the clause of the act which provides that no action shall be brought until after a month's notice, "for anything done or intended to be done under the authority of the act." In answer to this objection it has been argued on the part of the plaintiff, that the charge against the defendants is not of any act done or intended to be done, but of an omission to erect or cause to be erected a fence between the footpath and the goit, and that the omission to do an act is not "an act done or intended to be done." Some authorities have been cited on both sides; but we think that, whatever may be the construction which might be put upon the words of the statute, if the question arose in this case for the first time, it is now settled by authority, that an omission to do something that ought to be done in order to the complete performance of a duty imposed upon a public body under an act of parliament, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done within the meaning of these clauses, requiring notice of action for the protection of public bodies acting in the discharge of public duties under acts of parliament.

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(1) 4 B. & S. 361; 33 L. J. (Q.B.) 39.

(2) Law Rep. 3 C. P. 56.

10 Jur NS 257

In *Davis* v. *Curling* (1), the defendant, the surveyor of a parish, was charged with having negligently permitted a quantity of gravel to remain by the roadside for an unreasonable time, whereby the carriage of the plaintiff was driven against the gravel, and overturned, and the plaintiff hurt and injured. Upon the trial there was a verdict for the plaintiff with leave to move for a nonsuit, and the Court made the rule absolute, on the ground that, although the grievance complained of was the omission to remove the gravel, or the permitting it to continue unremoved upon the road, it came within the substantial meaning of the act of parliament, and was a tort committed in the course of the defendant's official duty, and that the permitting the obstruction to remain for an unreasonable time was a positive act done in his public character as surveyor, within the act of parliament. So in *Poulsum* v. *Thirst* (2), the defendant, a contractor under the Metropolitan Board of Works, was held entitled to a notice of action, where the provision was in the same words "anything done or intended to be done under the powers of such board or vestry, under the said acts or this act," and the grievance charged was the omission to remove the water by pumping above a dam built across a sewer. These authorities are conclusive; and we are therefore of opinion that the defendants were entitled to notice of action, and that on this ground also the rule must be made absolute for a nonsuit.

Rule absolute for nonsuit.

Attorneys for plaintiff: *Gregory, Rowcliffe & Co.*

Attorneys for defendants: *Williamson, Hill & Co., for J. E. Norris, Halifax.*

(1) 8 Q. B. 286.

(2) Law Rep. 2 C. P. 449.

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Nuisance—Sewer—Construction—Local Act and General Act—Compensation—Nuisances Removal Act, 1855 (18 *&* 19 *Vict. c.* 121), *ss.* 21 *and* 22—*General Highway Act* (5 *&* 6 *Wm.* 4, *c.* 50), *ss.* 54 *and* 67.

Section 22 of the Nuisances Removal Act, 1855, does not empower the local authority to make a new sewer through private enclosed land, where no sewer existed previously, unless it is absolutely necessary for the purpose of removing an existing nuisance.

Semble (per Kelly, C.B. and Channell, B.), that the compensation provided by s. 67 of 5 & 6 Wm. 4, c. 50, and by s. 22 of the Nuisances Removal Act, 1855, referring to that section, is compensation only for the damage caused to land in executing the works there described, but not for the permanent injury to or occupation of the land. (Per Martin, B.): That it is compensation for all injury.

By the Bury Local Act, improvement commissioners were (s. 102) empowered to make whatever sewers, &c., they should think necessary, and (if it should be found necessary) to carry the same through enclosed lands, "making full compensation to the owners or occupiers thereof;" twenty-eight days' notice was to be given (s. 110), and objections were to be heard by the commissioners before commencing the work; and (s. 111) an appeal to the quarter sessions against the undertaking of any such works by the commissioners was given to any person aggrieved:—

Held, that these provisions of the local act were not repealed or superseded by the provisions as to sewers in the Nuisances Removal Act, 1855, although the commissioners were (by s. 3) the local authority under that act.

The defendants were improvement commissioners for Bury. A watercourse which received the sewage of several drains became a nuisance, and was incapable of being rendered innocuous without constructing a new sewer; the defendants constructed a sewer, carrying it for a short distance by the side of the watercourse, and thence across the plaintiff's enclosed land, where no sewer before existed, to join a lower system of drainage. This was the most convenient and inexpensive course to adopt, but it did not appear that the nuisance could not have been otherwise remedied. The preliminaries required by the local act were not complied with, and the defendants justified under s. 22 of the Nuisances Removal Act, 1855:—

Held (per Kelly, C.B., and Channell, B.), that the defendants had no power to make the new sewer through the plaintiff's land.

(Per Martin, B.): that s. 22 of the Nuisances Removal Act, 1855, gave the defendants power to make the sewer, and that this power was not restrained by the previous local act.

Revd in Ex Ch 4 Ex 222

SPECIAL CASE stated in an action brought by the plaintiff, as reversioner, against the defendants, for constructing a sewer in his land.

In 1848, the defendants constructed a common sewer, coming

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down a lane called Bell Lane into the Bury and Rochdale turnpike road, thence running along the turnpike road for some distance, and finally discharging itself into a brook crossing the road, called Huntley Brook.

For about thirty years before action brought, another common sewer came down the same turnpike road from the opposite direction, and also discharged itself into Huntley Brook; this was originally a surface sewer, but in 1846 it came into the defendants' hands, and was afterwards covered over by them, and used as a common sewer.

At the point in the turnpike road where these sewers respectively fell into the Huntley Brook, called in the case the Junction, a road, called the Chesham Fold Road, joined the turnpike road; and before and since the passing of the defendants' special act (1846), a sewer came down that road, and discharged into the Huntley Brook at the Junction, the refuse water, sewage and drainage, from a mill and some houses on the Chesham Fold Road, and also the overflow water from the reservoirs connected with the mill.

The Huntley Brook came from the same direction as the last mentioned sewer, and crossing the road at the junction, carried down the contents of the three sewers towards the river Roche.

Complaint was made to the defendants on the 25th of April, 1863, and on the 7th of March, 1866, by an occupier of land on the lower course of the brook, of the nuisance occasioned by the turning into the Huntley Brook of the Bell Lane sewer; and it was stated by him (and it was admitted to be true), that since the making of the sewer the brook had become a nuisance.

Upon this the defendants, pursuant to a report of their surveyor, constructed the sewer in question, intercepting the drainage of the three existing sewers (except the overflow water of the mill) at the junction, and carrying it for a short distance by the side of the Huntley Brook, thence diagonally across the plaintiff's land, then down a lane called Back Lane, which came out of the turnpike road opposite Bell Lane, and thence into an existing system of sewers connected with the river Roche.

The case found as a fact that the nuisance could not be removed without constructing a new sewer, and that the course pursued by the defendants was the most inexpensive and convenient for the purpose.

The new sewer was carried across the plaintiff's land (then let on lease), where no common sewer before existed, the land being enclosed land, and not a public way, and being within the limits of the special act. It was constructed with the consent of the tenant in occupation of the land, but without the leave of the plaintiff; and no notice was given by the defendants under the 110th section of the special act.

It was found that the defendants had injured the plaintiff's reversion by the construction of the sewer, and that the sum necessary to reinstate the premises was 87*l.*; and the questions for the Court were:—

1. Whether the defendants were justified under the acts referred to in the pleadings (18 & 19 Vict. c. 121; 11 & 12 Vict. c. 63; and 9 & 10 Vict. c. ccxciii.) or any of them, in cutting and constructing the sewer?

2. Whether they ought to have given notice under the 110th section of the special act before commencing the works?

The defendants were commissioners under the Bury Improvement Act, 1846 (9 & 10 Vict. c. ccxciii.), and also by s. 3 of the Nuisances Removal Act (18 & 19 Vict. c. 121), the local authority under that act. By s. 82 of the local act they were also surveyors of highways, with all the powers of surveyors.

By s. 101 of the local act, all sewers, and all works therewith connected, existing within the limits of the act, or thereafter to be constructed, and the management and control over such sewers and works, were vested in the commissioners.

By s. 102, the commissioners were empowered to construct "such and so many main and other sewers and drains as they shall think necessary . . . in, under, or across all or any of the streets, whether dedicated to the use of the public or not, and other places within the limits of this act, and, if needful, through and across all underground cellars and vaults which they may find under any of the said streets or other places, doing as little damage as may be, and *making full compensation* for any damage done . . . and in case it shall be found necessary for completing any of the aforesaid works, to build, carry, and continue the same into and through any enclosed lands or place not being a public way, it shall be lawful for the commissioners to build, carry, and continue the same into or through the said lands or other place accordingly, *making full compensation* to the owners and occupiers thereof."

By s. 110, "Before making any sewer under this act where no common sewer previously existed, and before commencing to widen, deepen, embank, alter, arch over, or amend, any sewer at present existing, and before abandoning any old sewer, the commissioners shall give notice of their intention," by affixing (in certain public places), twenty-eight days at least before the commencement of any such work, a printed or written notice, setting forth the names of the places "through or near which it is intended the new sewer shall pass, or the existing sewer be altered or amended, or the old sewer be stopped up," referring to a plan to be deposited in the office of the commissioners; "and such notice shall also set forth the time and place appointed for holding a meeting of the commissioners to consider any objections made against such intended works; and all persons who shall deem themselves interested therein, or likely to be aggrieved thereby, shall be entitled to be heard before the commissioners at such meeting;" and the commissioners may abandon or make alterations in the intended works; provided that no alteration causing a deviation of more than ten yards from the line described in the notice and set forth in the plan, shall be begun, "until the end of seven days after an *order* for the execution thereof shall have been duly made by the commissioners, and entered in the books of the commissioners."

By s. 111, "it shall be lawful for any person liable to contribute towards the expense of any of the works aforesaid, or who shall deem himself to be aggrieved by the undertaking of such work, at any time within seven days next after the making of any such order by the commissioners," to give notice of appeal against the undertaking of such work; and on his entering into a recognizance within four days to try the appeal, &c., the commissioners are not to begin to execute the work until the judgment of the court on the appeal.

By s. 21 of the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), "all surveyors and district surveyors may make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, in and through any lands or grounds adjoining or lying near to any highway, *upon paying* the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall thereby sustain, to be settled and paid in such manner as the damages for getting materials in enclosed lands or grounds, are directed to be settled and paid by the law in force for the time being with regard to highways." (1)

Section 22, "wherever any ditch, gutter, drain, or watercourse, used, or partly used, for the conveyance of any water, filth, sewage, or other matter from any house, buildings, or premises, is a nuisance within the meaning of this act, and cannot, in the opinion of the local authority, be rendered innocuous, without the laying down of a sewer, or of some other structure *along the same or part thereof or instead thereof*, such local authority shall, and they are hereby required, to lay down such sewer or other structure, and to keep the same in good and serviceable repair; and they are hereby declared to have the same power as to entering lands for the purposes thereof . . . as are contained in 5 & 6 Wm. 4, c. 50, s. 67 . . . and the provisions contained in this section shall be deemed to be part of the law relating to highways in England, &c."

By 5 & 6 Wm. 4, c. 50, s. 67, power is given to the surveyor, &c., "to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses . . . in and through any lands or grounds adjoining or lying near to any highway, *upon paying* the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in enclosed lands or grounds are herein directed to be settled or paid."

Section 54 enacts, that if sufficient material cannot be found in waste lands, &c., then the surveyor may, by licence from the justices, search for, dig, and get materials, in "any of the several or enclosed lands or grounds of any person whomsoever" (with certain exceptions) . . . "*making such satisfaction* for the *materials* which may be got or taken away, and also for the *damage* done to such lands or grounds by the getting and carrying away the same, as

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(1) See 5 & 6 Wm. 4, c. 50, s. 54, *post* p. 125.

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shall be settled and ascertained by order of the justices at a special sessions for the highway." (1)

Jan. 21. *Temple, Q.C.* (*Jones, Q.C.*, and *J. A. Russell* with him), for the plaintiff, contended that the only power which the defendants possessed of making such a work was under their local act (not complied with in this case) which contained ample provisions for compensation; but that under s. 22 of the Nuisances Removal Act their only power was to make a sewer along the course of an existing sewer; and in that case no such provision for compensation was made, since s. 67 of the Highway Act referred to by that section, only provided compensation for injury done in the course of executing works, but gave no compensation for the permanent injury to or occupation of the land.

Manisty, Q.C. (*Holker* with him), for the defendants, contended that s. 22 of the Nuisances Removal Act, read in connection with s. 21, and with 5 & 6 Wm. 4, c. 50, s. 67, justified them; that looking at the facts stated, it must be taken that the sewer was part of a system of drainage which rendered it necessary it should be made in the manner adopted, and that to effectuate the purposes of the act the whole system must be regarded as one; *Reg.* v. *Bodkin* (2), *Reg.* v. *Gee* (3); that the compensation provided by the section included all damage done; and that the special act, with the necessity for notice, &c., was superseded by the subsequent general act.

Temple, Q.C., in reply, cited *Fitzgerald* v. *Champneys* (4), to shew that the special legislation was not affected by the general act.

Cur. adv. vult.

Feb. 28. MARTIN, B., read the following judgments:—

KELLY, C.B. [After stating the facts of the case.] The defendants justified their act under the 18 & 19 Vict. c. 121, s. 22, and the question is, whether they were authorized to carry this sewer through the close in question. I am of opinion that the defendants had no such authority, and that the plaintiff is entitled to the judgment of the Court.

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(1) By s. 51 the surveyor has power, by licence of the justices, to get materials in any waste land, &c., *without making any satisfaction* for the *materials, but making satisfaction* for all *damages* done to the land "by carrying away the same," in manner directed by s. 54.

(2) 30 L. J. (M. C.) 38. 6 Jur NS 1370

(3) 1 E. & E. 1068; 28 L. J. (Q.B.) 298. 5 Jur NS. 1348

(4) 2 J. & H. 31; 30 L. J. (Ch.) 777. 7 Jur NS 1007

Upon considering the several acts referred to, it will be found that the defendants, as improvement commissioners for Bury, acquired the ownership, and became entitled to the control and management of the whole of the sewers within the district, subject only to the right vested in the local authority to correct or remedy a nuisance existing in any sewer or drain under the provisions of s. 22 of the act before referred to.

The right conferred upon the defendants under this 22nd section is merely to lay down a "sewer or other structure" along any "ditch, gutter, drain, or watercourse" used for the conveyance of sewage, or along "part thereof or instead thereof," where such drain has become a nuisance, and cannot be otherwise rendered innocuous. But the "local authority" have no general power to construct new sewers, or to deal with old ones, except under the above words of the act.

That power is conferred alone upon the improvement commissioners, who by the express language of s. 102 of the Bury Improvement Act, 1846, are authorized to construct whatever sewers and drains they may think necessary, not only in, under, and across the street, but through and across the underground cellars and vaults within the district; and also, if necessary, to carry their sewers "into and through any enclosed lands or other place not being a public way," within the limits of the act. But the exercise of this power is subject to the right of compensation in the owners and occupiers of the land, and subject also (by s. 110) to the condition of giving a public notice of twenty-eight days before the commencement of the work, and of appointing and holding a meeting of the commissioners to consider any objections which may be made by any one interested in the execution of the contemplated works; and further, if the commissioners should decide against the objection, and persevere in the work, the party aggrieved has (by s. 111) an appeal to the quarter sessions against their decision.

The scheme of the acts considered together appear to be, to confer upon the authorities constituted under the local act a general power to make and maintain, repair, divert, or alter all drains and sewers, old or new, when, where, and as they deem necessary or expedient; but this power is subject to reasonable restrictions and conditions, and among them to the all-important condition, that the owners of property taken or injured, and the ratepayers by whom the cost of all these works must be borne, may be heard in the first instance before the local authorities against the proposed works, and at last may appeal against their decision to another tribunal. But, on the other hand, the local authority, wherever throughout England the general act is applicable, is invested with a specific, but unlimited and unconditional power, to put an end at once to any nuisance found to exist, and which may endanger or prejudice the public health; and for this purpose they may cover in, or repair, or alter any drain or sewer, or make an old sewer into a new one, if necessary to do away with the nuisance. But this seems to be confined to cases of necessity, and to the operating locally on the spot upon drains or sewers in which a nuisance has arisen. I think it cannot have been the intention of the legislature to confer an unlimited and unconditional power upon the local authority, to construct new sewers wherever they, in their discretion, may think fit, whether through or under enclosed lands, or houses or buildings of whatever class or description or value, and at whatever amount of expense, and without notice, and without appeal, and without an opportunity to either ratepayers or proprietors even to appear and be heard against the contemplated works, however seriously they might affect their interests, their comforts, or their prosperity.

[His Lordship stated ss. 102, 110, and 111 of the Bury Improvement Act, 1846, and proceeded]:—The defendants, therefore, in their character of commissioners, were authorized to construct the sewer in question; but only subject to the above conditions of giving public notice of holding a meeting at which the plaintiff could have been heard against the making of the sewer, with an appeal to the sessions in case they should have decided against him; and, finally, of making compensation if the sewer should at length be carried through his land. It seems to me impossible to suppose that the legislature, with this act, and all these provisions for the protection or indemnity of the owners of property in this district in full force and operation, could have intended to authorize these same commissioners, or any other body of persons who might have constituted the local authority, to do these acts to the injury of the owners of property, without any notice, without any opportunity of being heard against it, without any appeal, and without compensation; or, at least, that the legislature could have conferred so extraordinary a power, not subject to any conditions at all, without expressing that intention in clear and unambiguous language. It is contended, however, that the words of the Nuisances Removal Act (s. 22), authorizing "the laying down of a sewer or of some other structure along the same, or part thereof, or instead thereof," authorizes the local authority to do as they have done, that is, to abandon the old sewer throughout the greater portion of its course, and then to construct a new sewer in any direction, or through any description of property which happens to lie within the limits of the act. I think that these words simply mean, that where a sewer has become a nuisance, the local authority may render it innocuous, by either repairing or covering it in, or constructing a new and covered sewer instead of the open one which before existed. But it must be in the same line or course, and as nearly as may be upon the site of the former sewer. If it became necessary, it would not be unreasonable to read the words of the act, reddendo singula singulis, as authorizing the laying down of a sewer along the existing drain or part thereof, or another structure instead thereof. The section proceeds to declare, that the local authority shall have the same powers as to the entering lands for this purpose as are contained in ss. 67, 68 of the Highway Act. But 5 & 6 Wm. 4, c. 50, s. 67, to which reference is thus made, contains no express direction as to the entering of lands, or how any lands shall be entered; but relating, as it does, to the making of ditches, gutters, drains, and watercourses by surveyors of highways, enables them to carry such ditches or other works through any lands or grounds adjoining or lying near to any highway. I cannot think that any authority is thus conferred upon the local authority to make any new sewer through the enclosed land of the plaintiff, which does indeed happen to be on one side bounded by a highway, but which might have been surrounded by other enclosed lands a mile or miles distant from any highway at all.

It is to be regretted that the defendants should not have availed themselves of the ample powers they possess under the Improvement Act, to construct the work in question; but as it is admitted that no notice was given of their intention as required by s. 110, they are compelled to resort to the Nuisances Removal Act, and to claim a right to enter and use the plaintiff's land for the purposes of the work, without affording him the opportunity, which it is manifest that he is entitled to under the Bury Improvement Act, of being heard before the commissioners upon his objection to the work, and of appealing from their decision to the court of quarter sessions, in case they should have pronounced against him.

Looking, therefore, to the general intent of these acts of parliament considered together, to the express provisions of the Bury Improvement Act, and putting a fair and reasonable construction upon the words of the Nuisances Removal Act, I am of opinion that the carrying of the sewer through the enclosed land of the plaintiff was unauthorized and illegal, and that the plaintiff is entitled to the judgment of the Court. I have to add that my Brother Channell concurs with me in this judgment.

I have considered with very great attention the proposed judgment of my Brother Martin in this case; and I would observe that I am far from thinking that the Nuisances Removal Act is in any way controlled or restricted by the local Bury Improvement Act; which indeed is referred to, only as showing the care and vigilance with which the legislature has guarded the rights of property where a general power to construct sewers in any place, and through any description of property, is conferred upon a public body. I am of opinion on the contrary, that the Nuisances Removal Act should receive a large and liberal construction, and that it enables the local authority to resort to any means whatever, which may be absolutely necessary to put an end to a nuisance; and this on the ground that the exercise of powers without limit or restriction, may in some cases be necessary to put an end to a nuisance which may be prejudicial or dangerous to health or to human life. And if the traversing of the plaintiff's enclosed field were necessary to the completely remedying or removing the nuisance in question, I should think that even that measure might be resorted to under the 22nd section. But it is quite obvious that this end may be accomplished by merely carrying away the accumulation of filth, and converting the open drain into a covered sewer, upon the same spot and in the same direction, as that which now exists. It is therefore that I think that the local authority have exceeded their powers in entering and cutting through the enclosed land of the plaintiff, as complained of in this action.

MARTIN, B. [After stating the questions submitted to the Court]:—As to the second question, the learned counsel for the defendants abandoned their defence, and relied solely upon the 22nd section of the Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), where no notice is required. It was argued that the operation of the 22nd section was restrained by the Bury Improvement Act, 1846. Very extensive powers to make sewers are thereby given, and compensation is to be paid to the owners of enclosed lands through which they are made. By s. 110, notice is to be given of the intention to make them, and the defendants cannot justify under it, because they did not give the required notice. But in my opinion the 22nd section is not restrained by the local act. The Nuisances Removal Act, 1855, is a general act, applicable to all England. There is not one word to shew, either expressly or by implication, that its provisions are to be restrained by local acts. The legislature of late years have passed a variety of acts for the removal of nuisances and prevention of disease, and have dealt very summarily with what has been called in the argument "private rights." The object of this act is declared to be, to substitute more effectual provisions than then existed. (1) The enactments of the 22nd section are general. There is no reference to local acts; and it occurs to me that its operation would be fettered and crippled, and its construction and operation rendered impracticable, if its plain and unambiguous language is to be affected by the infinite number of local acts in which provisions are to be found relative to sewers. These provisions are not uniform, and if the construction contended for on behalf of the plaintiff be correct, one construction would be required to be given to the 22nd section as regards one town, and another as regards another, if the provisions in their respective local acts as to sewers

(1) See the Preamble.

were different, as in the great majority of instances they are. Great stress was laid upon the provision in the local act, that the owner is to receive compensation. By the 22nd section (incorporating the 67th section of 5 & 6 Wm. 4, c. 50), he is to be paid for the damages which he shall sustain. I do not myself appreciate the difference. The sewer is only an easement; and if the damages are to be paid which the owners sustain from the making of it, I think it would include compensation, if indeed in such a case compensation and payment for damage are not synonymous terms. In my opinion, therefore, the present case depends upon the 22nd section of the general act, and upon it exclusively.

[The learned Baron then stated the facts of the case, and proceeded]:—The 22nd section enacts, that wherever a watercourse, used or partly used for the conveyance of sewage from any house or premises, is a nuisance within the meaning of the act, and cannot in the opinion of the local authority be rendered innocuous, without the laying down of a sewer "along the same or part thereof or instead thereof," the local authority "shall and they are thereby required to lay down such sewer." Now, the facts found in the special case are, that there was a watercourse partly used for the conveyance of sewage from certain houses; that it was a nuisance within the meaning of the act; that it could not in the opinion of the defendants (the local authority) be rendered innocuous without the laying down the new sewer, which has been laid down in the least expensive and most convenient manner. Under such a state of facts, what duty did the act impose upon the defendants? In the very words of the section it is, that they should and were thereby required to lay down such a sewer, and that it might be made either along the old watercourse or part of it, *or instead of it*. It therefore seems to me that the defendants have done exactly what the section requires them to do. The section proceeds to enact that they are to have the same powers as to entering lands as were contained in the 67th and 68th sections of the Highway Consolidated Act, 5 & 6 Wm. 4, c. 50; and in another part of the section it is enacted, that the provisions in the section shall be deemed to be part of the law relating to highways. The 68th section forbids the owner or any other person to in any way interfere with drains made under the authority of the act, and does not apply to the provision to enter lands; but the 67th section enacts, substantially in the words of the 21st section of the Nuisances Removal Act, that for highway purposes, highway surveyors shall have power to make drains through the lands or grounds adjoining or near to the highway, upon paying to the owner of the land the damages which he shall sustain, to be settled and paid in the manner prescribed by the 54th section. Now, assuming it to be necessary for the defendants to rely upon this part of the 22nd section for their justification, it seems to me that their powers of entry is, to enter upon any lands within their jurisdiction for the purposes of laying down the sewers, but that compensation is to be made to the owners for the damage they sustain.

It is a true test in such cases as the present, to frame a special plea of justification, and ascertain whether the facts found in the special case would prove it. It is my opinion that they would, and that a plea so framed would be good on demurrer, and that there are no facts found in the case which would be an answer to it by way of replication. (1)

It was contended by the learned counsel for the plaintiff, that a strict construction should be applied, by reason that the power of entry into lands of a private individual for public purposes is an extreme exercise of legislative power. On the other hand it was contended by the learned counsel for the defendants, that the object of the legislature being the avoidance of public nuisances and the prevention of disease, a most liberal construction should be made. I have given the construction of the 22nd section which, it seems

(1) The learned Baron here added:—"What I have stated to be the true test in the matter was the test which was always applied by a former judge of this Court (Lord Wensleydale), whose death I regret to see announced this morning. Having sat for many years with that learned judge, and having practised before him for a much longer period, I think it is but becoming in me to state that in my opinion the country has lost by his death one of the most learned lawyers and one of the ablest judges who ever sat in Westminster Hall. No one who has not had the advantage of sitting with him on the bench can thoroughly appreciate the qualities of his great mind, or his earnest wish at all times to do his duty. He never allowed anything to interfere with the conscientious discharge of those duties which he imposed upon himself, or felt belonged to him in connection with his position as a judge. He was, without doubt, the ablest and best public servant I was personally acquainted with in the whole course of my life."

to me, the natural and ordinary meaning of its words imports; and applying it to the facts found, in my opinion there is an answer to the action.

I would observe, however, that if in the neighbourhood of towns the legislature confer large and extensive powers over adjoining lands, for the purpose of securing the comfort and health of the inhabitants, they may not unreasonably justify themselves by the consideration, that the very neighbourhood increases in value, in very many instances, and probably at this town of Bury, one-hundredfold; and with this enormously increased value, there is no just ground of complaint, that the owner is subjected to somewhat more stringent provisions for the public good, than owners of property not so happily and advantageously situated.

I have had the advantage of reading the judgment of the Chief Baron, which is concurred in by my Brother Channell. The ground of difference between us is plain and manifest. I am of opinion that a general act relating to the sewage of towns, expressed to apply to the whole of England, and in no way referring to local acts, is to be construed according to the ordinary and natural meaning of the words used, and is not to be restricted or affected by local acts. If the contrary view be correct, the inevitable consequence will be, that instead of the general act operating uniformly and consistently throughout the kingdom, there will, as regards different towns, be so many different constructions as there are different local acts varying in their provisions relating to sewers: such local acts are very numerous, and probably no two of them precisely correspond.

The practical effect of the judgment of the Court will be, that the town of Bury will be deprived of the benefit of the Nuisances Removal Act for England, 1855, by reason of the existence of a local act in nowise referred to by the general act. In my judgment this is going beyond the legitimate functions of judicial construction.

Judgment for the plaintiff.

Attorneys for plaintiff: *Appleby, Wright, & Crowther, for S. & S. Woodcock, Bury.*

Attorneys for defendants: *Ridsdale & Craddock, for Harper & Dodds, Bury.*

BUCKLEY *v.* JACKSON.

1868
Jan. 16.

Bill of Exchange—Restrictive indorsement.

Indorsement of a bill of exchange, "Pay J. S., or order, value in account with H. C. D." In an action by a subsequent indorsee against the indorser:—

Held, that the indorsement was not restrictive.

Stuart v. *Murrow* (8 Moo. P. C. 267), followed.

ACTION by the ultimate indorsee of a bill of exchange, drawn by defendant "for co-lessee and self," upon and accepted by the Glen Auldin Slate and Slab Quarry Company, Limited, and indorsed by the defendant in these words:—"Pay J. Spittal, Esq., or order, value in account with H. C. Drinkwater, Esq. For self and co-lessee. J. S. Jackson."

The defendant pleaded, 7thly, that he indorsed the bill to Spittal at the request of Drinkwater, for the accommodation of Drinkwater, to give title to the bill as against the acceptors, and without any value or consideration for the drawing, indorsement, or payment of the bill by defendant; that Spittal indorsed in blank to Drinkwater without value, in order that Drinkwater might indorse the bill back to Spittal, as security for a promissory note of Drinkwater's, of which Spittal was holder; that Drinkwater did so indorse the bill back to Spittal, who then deposited it with his bankers, with the promissory note, for a special purpose, viz., that the bankers might as his agents hold the bill on his behalf as such security, and without any other value or consideration; that the bankers, contrary to the said purpose, and in fraud of the defendant, and of Spittal, and without their consent, handed the bill to Drinkwater, who with notice of the premises, received the same in fraud of the defendant and of Spittal; that when the bill was indorsed to the plaintiff the same was overdue, and that plaintiff had notice of the premises, and it was indorsed to and held by him without value or consideration.

8thly, on equitable grounds, that when the defendant indorsed the bill to Spittal it was mutually agreed between them that the indorsement should be taken to be without recourse to defendant;

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that Drinkwater when the bill was indorsed to him had notice of the premises, and that there was no value or consideration for the indorsement to him, and he always held the bill without value or consideration; that the plaintiff when the bill was indorsed to him had notice of the premises, that the bill was then overdue, and that it was indorsed to and was held by him without value or consideration.

At the trial, before Martin, B., at the Manchester winter assizes, 1867, the defendant proved that he indorsed the bill under the circumstances stated in the 7th and 8th pleas; on the other hand, the plaintiff proved that it was indorsed to him before it was due, for consideration, and without express notice; but it was contended for the defendant that his indorsement was restrictive, and gave notice to the plaintiff of the agreement under which he indorsed it. The learned judge ruled that the indorsement was not restrictive, and a verdict was taken for the plaintiff.

Higgin moved for a new trial on the ground of misdirection; and distinguished the case of *Stuart* v. *Murrow* (1), on the ground that in that case not the restrictive indorser himself, but an antecedent indorser (the drawer of the bill) was sued.

[KELLY, C.B. Value in account means only value received in account, and is of the same effect in an indorsement as on the face of the bill. It expresses that value has been received, and received in a certain manner, but it in no way restricts the effect of the indorsement.]

Per Curiam (KELLY, C.B., MARTIN, and PIGOTT, BB).

Rule refused.

Attorney for defendant: *T. E. Jones, Manchester.*

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(1) 8 Moo. P. C. 267.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER.

IN AND AFTER

EASTER TERM, XXXI VICTORIA.

SHAW, Appellant; MORLEY, Respondent. 1868 April 22.

Betting—Gaming—Construction—" Office"—" Place"—16 & 17 *Vict. c.* 119.

10 QB 104
8 QBD 27
279

On land adjoining a race-course, and just outside an inclosure reserved for ticket-holders, was a long strip of ground of six feet wide, bounded on one side by an iron railing which surrounded the inclosure, on the other side by a permanent wooden paling, facing the open ground. Within this strip were placed temporary wooden structures, in which during the races the business of betting was carried on. They had desks fronting both ways, and at each desk was a clerk with a book, and a person standing in front of each desk conducted the business on behalf of the person who rented the strip of land, and the bets were recorded by the clerk. At one of these structures the appellant conducted this business. On appeal from a conviction under 16 & 17 Vict. c. 119, s. 3:—

Held, that this structure was an "office" and a "place" within the meaning of the statute, and that the appellant was rightly convicted.

Case stated under 20 & 21 Vict. c. 43, by Justices of Doncaster, who had convicted the appellant in the sum of 25*l.*, on an information under 16 & 17 Vict. c. 119, s. 3, charging him with having, on the 10th of September, 1867, "knowingly and wilfully had the care and management of, and assisted in conducting the business of an office and place at Doncaster, then and there opened, kept,

LR 9 CP 341,-254-5-7

and used for the purpose of betting with persons resorting thereto, &c." (1)

It was proved before the magistrates, that the Town Council of Doncaster were, as lords of the manor, owners of the soil of the Doncaster Town Moor, where the Doncaster races are run; that at various times race-stands had been built on a portion of this ground fronting the race-course, which was inclosed by iron railings, and was called "The Inclosure;" and that to the Grand Stand and the Inclosure the public were admitted by guinea tickets during the four days of the September meeting.

Along the east end of the Inclosure, outside it, and at a distance of about six feet from the iron railing which inclosed it, ran a permanent wooden palisade, forming with the iron railing a space of about forty-four yards long and six feet wide.

In 1867, this space was let to William Nicholl for the September meeting, at the rent of 630*l*., and was used by him in the following manner. It was partitioned, and upon each plot of land a wooden structure of five feet high was erected, fronting both ways, the iron railing being on one side, and the wooden palisade on the other. The structure of which the appellant had the care and management was covered with green baize, and had boards used as desks fronting each way; a man sat at each desk, who acted as clerk, and recorded the proceedings in the book lying on the desk before him. Upon this structure was a board fronting both ways, bearing the words "William Nicholl, of Nottingham," and papers, partly printed and partly written, with the names of races, horses, and betting prices. The betting lists so exhibited had on them the odds upon and against each horse in each race which William Nicholl, the proprietor of the structure, was willing to bet.

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(1) 16 & 17 Vict. c. 119 (entitled "An Act for the Suppression of Betting Houses"), recites that "a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons, by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies;" and enacts, by s. 1, that "no *house*, *office*, *room*, *or other place* shall be opened, kept or used" for the purposes mentioned in the preamble; and by s. 3, that "any person who, being the owner or occupier of any *house*, *office*, *room*, *or other place*, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; . . . . and any person having the care or management of, or in any manner assisting in conducting the business of any *house*, *office*, *room*, *or place*, opened, kept, or used for the purposes aforesaid, or any of them," shall, on summary conviction before two justices, be liable to a penalty not exceeding 100*l*.

On the 10th of September, 1867, the appellant transacted the betting business at one frontage of this structure. He bet six half-sovereigns to one against a horse called Knight Errant, in the Great Yorkshire Handicap, received a deposit of half-a-sovereign, and called out the transaction to the clerk at the desk, who entered it in the book, and gave to the taker of the odds a card. This and similar transactions by the appellant with divers persons resorting to the said wooden structure on the same day were proved, and the appellant both received and paid money on the race events of that day. The appellant was the only person inside the structure with the clerks, but another person outside transacted the business with the public at the other frontage.

The questions for the opinion of the Court were, first, whether the structure was an "office" within the meaning of 16 & 17 Vict. c. 119, s. 3; secondly, whether it was a "place" within the meaning of the same statute.

Manisty, Q.C. (*Merewether* with him), being called upon to support the appellant's case, contended that the structure was not an office or place within the meaning of the act, which was directed, not against the ordinary and long-accustomed betting which took place upon a race-course, but against the kind of gaming "newly sprung up" in large towns by means of betting houses or "hells;" and that an "office or place" to be within the act must be ejusdem generis with a "house and room," which this was not, being only a temporary wooden structure, not even covered with a roof, and incapable of answering the purposes served by the betting houses which the act was meant to suppress. He cited *Doggett* v. *Catterns.* (1)

Sleigh (*Mellish, Q.C.*, with him), for the respondent, was not called upon.

KELLY, C.B. In my opinion, the decision of the magistrates was right, and the respondent is entitled to our judgment. This structure was clearly a place and an office opened, kept, and used for the purpose of carrying on the business of which the appellant had the care and management, or which he assisted in conducting. If, on the grounds urged by the appellant, we were to determine to the contrary, at once betting offices, copied from the words in which this structure is described, would throughout England set the act at defiance. It is no matter whether there is a roof or none, or whether the structure is movable or fastened to the earth; it is clearly an office within the meaning of the act. Then, was the business conducted by the appellant the business prohibited by the act? The preamble shews that it is within the intent of the act; for the mischief recited is exactly gaming of the description which was here conducted by the appellant, carried on by means of an office. And further, the business described in the first section, and the conducting of which in an office kept for that purpose is made penal by the third section, is exactly the business described in the case as conducted by the appellant; from the beginning to the end, what has been done is the very thing to prevent which the act was passed.

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(1) 17 C. B. (N.S.) 669; 34 L. J. (C.P.) 159. 11 Jur N.S 243.

MARTIN, B. I am of the same opinion. The structure described was both an office and a place. What it most resembles is those movable offices on wheels in which merchants conduct their business of lading and unlading ships in the docks of Liverpool, and I have no doubt that such a structure would be an office or a place within the meaning of the act. But this was more, it was a fixed place. It is equally clear that the appellant has done in this place what the act declares to be illegal. Mr. Manisty wishes us to read into the act a proviso that it shall not apply to race-courses, but for this there is no ground.

PIGOTT, B. No doubt the mischief chiefly aimed at by the act was the establishment of betting houses in towns; but, fortunately, the language is large enough to hit those who are attempting to evade its provisions by plying their trade upon a race-course. The betting that goes on at those places is just of the kind to which the act intended to put a stop, and entirely differs from the ordinary betting of the race-course, which is not prohibited. The circumstance that this office is only a temporary structure of wood is of no importance; and the case of *Doggett* v. *Catterns* (1) is entirely different.

Judgment for the respondent.

Attorneys for appellant: *Brooksbank & Gallard, for Shirley & Atkinson, Doncaster.*

Attorneys for respondent: *Wright & Bonner.*

RESTALL *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

April 24.

3 QB 335
3 QB 386-7-9
3 CP 647-8
[illegible] 126
4 CP. 17-8,
4 QB 332-3,-336,-8,

Costs—County Courts Act, 1867—*Power to make Order for Costs under Repealed Act—Effect of repeal—Verdict before repeal.*

The plaintiff, in December, 1867, obtained a verdict for 5*l.* in an action of contract commenced before the 20th of August, 1867, on which day the County Courts Act, 1867, which repealed the 15 & 16 Vict. c. 54, s. 4, was passed, and which came into operation on the 1st of January, 1868. After the 1st of January, 1868, he applied to a judge under the 15 & 16 Vict. c. 54, s. 4, for an order for costs, on the ground that the superior and county courts had concurrent jurisdiction:—

Held, that the action having been commenced before the County Courts Act, 1867, passed, and the verdict having been found before it came into operation, the plaintiff was entitled to his costs as a matter of right, and that, notwithstanding the repeal of the 15 & 16 Vict. c. 54, s. 4, there was power to make the order.

THIS was an action of contract. It was commenced in August, 1865, and was tried originally before Pollock, C.B., at the sittings in London, after Hilary Term, 1866, and a verdict was found for the plaintiff, damages 30*l.* A rule was afterwards obtained and made absolute for a new trial, on the ground that the damages were excessive. The cause was tried a second time before Kelly, C.B., at the sittings in London, after Michaelmas Term, 1867, and a verdict found for the plaintiff, damages 5*l.*, leave being reserved to the defendants to move to enter a nonsuit or a verdict for nominal damages. In Hilary Term last, a rule was moved for in pursuance of the leave reserved, but it was refused, and the plaintiff thereupon signed judgment. He then took out a summons for an order for costs, under 15 & 16 Vict. c. 54, s. 4, on the ground that the superior and county court had

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(1) 17 C. B. (N.S.) 669; 34 L. J. (C.P.) 159. 11 Jur. N.S. 243.

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RESTALL v. LONDON AND SOUTH WESTERN RAILWAY CO.

concurrent jurisdiction under 9 & 10 Vict. c. 95, s. 128, the plaintiff and defendants dwelling more than twenty miles apart. Meantime, on the 1st of January, 1868, the County Courts Act, 1867 (30 & 31 Vict. c. 142), which was passed on the 20th of August, 1867, had come into operation. By that act, the 9 & 10 Vict. c. 95, s. 128, and 15 & 16 Vict. c. 54, s. 4, were repealed. This being so, Bramwell, B., before whom the summons was heard, felt doubt as to whether he had power to make the order, and referred the matter to the Court. Before making any application to the Court, however, the plaintiff sought to have his costs taxed by the master in the ordinary manner, under the Statute of Gloucester, but the master declined to tax them. Thereupon a rule was obtained in Hilary Term last, calling on the defendants to shew cause why an order for costs should not be made under 15 & 16 Vict. c. 54, s. 4, or why the costs should not be taxed in the ordinary manner.

The Statute of Gloucester (6 Ed. 1. c. 1) enacts, that in all cases where damages are recovered, costs also shall be recovered.

The 9 & 10 Vict. c. 95, s. 128, enacts (among other things) that all actions which before the passing of that act might have been brought in any superior court, where the plaintiff dwells more than twenty miles from the defendant, may be brought and determined in any superior court, at the election of the party suing, as if that act had not been passed. The 13 & 14 Vict. c. 61, s. 11, enacts that "if in any action in covenant, debt, detinue, or assumpsit (not being an action for breach of promise of marriage) the plaintiff shall recover a sum *not exceeding* 20*l*. . . . he shall have judgment to recover such sum only, and no costs, except in cases hereinafter provided." By s. 12, power is given to the judge at the trial to certify so as to entitle the plaintiff to his costs, although in any such action as aforesaid, he recover a sum less than the sum in that behalf hereinbefore mentioned. By s. 13 the Court or a judge are empowered to make an order for costs, on the plaintiff shewing them that the cause was one in which concurrent jurisdiction was given to the superior courts under 9 & 10 Vict. c. 95, s. 128.

The 15 & 16 Vict. c. 54, s. 4, repeals the 13 & 14 Vict. c. 61, s. 13, and enacts that in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of 13 & 14 Vict. c. 61, s. 11, if the plaintiff shall make it appear to the satisfaction of the Court, or a judge at chambers upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts under 9 & 10 Vict. c. 95, s. 128 . . . then the Court or judge shall by rule or order direct that the plaintiff shall recover his costs.

The 30 & 31 Vict. c. 142, which (s. 36) came into operation on the 1st of January last, repeals 9 & 10 Vict. c. 95, ss. 128, 129; 13 & 14 Vict. c. 61, ss. 11, 12, and 15 & 16 Vict. c. 54, s. 4.

Jan. 31. *C. W. Wood* shewed cause. The power to make an order for costs under 15 & 16 Vict. c. 54, s. 4, is gone, that section having been repealed in absolute terms. In *Morgan* v. *Thorne* (1), a similar question arose as to a certificate under 43 Eliz. c. 6, s. 2, to deprive a plaintiff in trespass of his costs, which was granted after 3 & 4 Vict. c. 24, had come into operation, repealing 43 Eliz. c. 6, s. 2, so far as it related to actions of trespass. The Court held that the act having been repealed the certificate was null and void.

[MARTIN, B. The County Courts Act, 1867, repeals not only the 15 & 16 Vict. c. 54, s. 4, but also the sections of the former county courts acts which deprive a plaintiff who recovers less than 20*l.* of his costs. May it not be that the plaintiff is thereby restored to his original rights under the Statute of Gloucester?]

No; the Statute of Gloucester was pro tanto repealed by 13 & 14 Vict. c. 61, s. 11, which is in direct antagonism to that statute so far as certain actions are concerned. Then the Statute of Gloucester having been thus repealed in part, the provisions of 13 & 14 Vict. c. 21, s. 5, apply. It is thereby enacted that "where any act repealing in whole or in part any former act is itself repealed, such last repeal shall not revive the act or provisions before repealed, unless words be added reviving such act or provisions." This statute applies to all cases of acts repealing former acts in whole or in part, whether the repeal is express or as in the present instance by necessary implication: Dwarris on Statutes, p. 533. Quocunque modo, therefore, the plaintiff has lost his costs. He can get them neither by an order under 15 & 16 Vict. c. 54, s. 4,

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(1) 7 M. & W. 400.

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nor by the Statute of Gloucester, which has been repealed as to county court actions by the former county court acts, and has not been revived on the repeal of the repealing acts.

Lewers, in support of the rule. The action having been commenced before the passing of the County Courts Act, 1867, and having been brought to verdict before that act came into operation, there is still power to make an order for costs under 15 & 16 Vict. c. 54, s. 4. But if it should be held that that power is gone, the plaintiff is still entitled to his costs, as the sections which deprive him of them are repealed also, and he is enabled to avail himself of the Statute of Gloucester. No express words were necessary to revive that act in the present instance, for the 13 & 14 Vict. c. 21, s. 5, only applies to cases in which an *expressly* repealing act is itself repealed.

[KELLY, C.B. The statute was not repealed in express terms, but its operation on a certain class of cases was prevented.]

The effect of the former county court acts was simply to qualify the general rule as to costs. It took them away in certain cases, at the same time providing a machinery whereby they might be recovered. But there is nothing in the language of the acts to amount to a "repeal" of the Statute of Gloucester within the meaning of 13 & 14 Vict. c. 21, s. 5.

Cur. adv. vult.

April 24. The judgment of the Court (Kelly, C.B., Martin and Channell, BB.) was delivered by

KELLY, C.B. In this case an application is made to the Court to grant a rule or order to the master to tax the plaintiff his costs.

The action was commenced in August, 1865, and the cause was tried in February, 1866, and a verdict found for the plaintiff with 30*l*. damages. In April, 1867, the verdict was set aside, and a rule made absolute for a new trial. The cause was again tried on the 12th of December, 1867, and a verdict found for the plaintiff, with 5*l*. damages.

In January, 1868, an application was made to Bramwell, B., to make an order to tax the plaintiff his costs, on the ground that the plaintiff resided at a greater distance than twenty miles from the defendants, and that this Court and the county court had concurrent jurisdiction. That application is now removed to the Court; and we are of opinion that the rule or order ought to be granted.

The chief provisions relating to costs in 9 & 10 Vict. c. 95, 13 & 14 Vict. c. 61, and 15 & 16 Vict. c. 54, are repealed by the County Courts Act of 1867 (30 & 31 Vict. c. 142), and it is contended that, inasmuch as that act came into operation on the 1st of January, 1868, neither the judge nor this Court have power to make the order in question. But we are of opinion that inasmuch as this action was commenced before that act was passed, and was tried, and the verdict, which entitled the plaintiff, as matter of right, to the order in question, was found before that act came into operation, the order is ex debito justitiæ, that therefore the act of 1867 did not deprive the judge of the power to make the order, and that a rule to the same effect ought now to be made by this Court. 4 CP 9

It becomes, therefore, unnecessary to determine whether the repeal of the acts disentitling the plaintiff to costs, with or without an order by a learned judge, revives the Statute of Gloucester which these acts pro tanto repeal.

Rule as prayed accordingly. (1)

Attorney for plaintiff: *Eley.*
Attorney for defendants: *Crombie.*

OLDREEVE v. PUCKRIDGE.

Lucius Kelly moved for a rule to tax costs in an action of contract, which was referred, and in which an award was made in favour of the plaintiff in July, 1867, for a less sum than 20*l.*, the jurisdiction not being concurrent, and the learned judge who tried the case, having declined to certify that it was a case proper to be tried in a superior court. Judgment had never been signed. 3 QB 339
4 QB 335,-6

He contended that the 13 & 14 Vict. c. 61, s. 11, and 15 & 16 Vict. c. 54, s. 4, being now repealed by 30 & 31 Vict. c. 142, s. 33, the Statute of Gloucester was in operation, and entitled the plaintiff to costs.

The Court held that the right to costs was fixed at the date of the award, at which time the repealed acts depriving the plaintiff of costs were in force, and refused the rule.

Rule refused.

Attorney for plaintiff: *Hemsley.*

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(1) See contrà, *Butcher* v. *Henderson*, L. R. 3 Q. B. 335.

1868 April 28.

AYLES *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Negligence—Railway Company—Evidence—Presumption—Railway over which several companies possess "running powers."

A train of the defendants whilst stationary on their railway, was run into by another train. The train in fault was the moving and not the stationary train. Several railway companies had "running powers" over the part of the defendants' line on which the collision occurred, and no evidence was given as to whether the moving train belonged to or was under the control of the defendants:—

Held, that in the absence of evidence to the contrary, it must be presumed that the train which caused the accident belonged to or was under the control of the defendants.

Declaration that the plaintiff, at the request of the defendants, was a passenger in one of their trains to be by them safely and securely carried from Deptford to Charing Cross for reward to the defendants, and the defendants received the plaintiff as such passenger, and thereupon it became the duty of the defendants to use proper care in carrying him on the said journey; yet the defendants did not use proper care in carrying the plaintiff, by reason whereof the train in which he was, struck against a certain other train then being upon the defendants' railway, and the plaintiff was thereby bruised and injured.

Plea: Not guilty. Issue.

On the 26th of December, 1867, the plaintiff was a passenger on the defendants' railway from Deptford to Charing Cross. The train in which the plaintiff was, was detained for some minutes outside the Cannon Street Station, which is between Deptford and Charing Cross, at a place where it is usual for trains to stop until notice is given that the station is clear. The morning was foggy, and whilst the train was stationary, another train, which was approaching Cannon Street on the same line of rails, ran into it, and threw the carriage in which the plaintiff was seated off the line. The plaintiff was hurt by the collision, and sought to recover damages for the injuries he had sustained. Other railway companies, besides the defendants, had running powers over the line on which the accident occurred. No affirmative proof was offered on the part of the plaintiff as to how the accident had hap-

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pened, or as to whether the train which caused it belonged to the defendants, or was under their control.

The cause was tried before Kelly, C.B., at the London sittings after Hilary Term last, when a verdict was found for the plaintiff, damages 80*l*. Leave was reserved to the defendants to enter a nonsuit on the ground that there was no evidence of negligence on the defendants' part to go to the jury. A rule nisi was afterwards obtained accordingly.

Willis appeared to shew cause, but the Court called on

O'Malley, Q.C., and *Bullen*, to support the rule. The evidence given was equally consistent with there being or not being negligence, and although the fact of the collision might be primâ facie evidence of negligence where the train which caused the accident was proved to be under the control of the defendants, it is not so when no evidence on that point is given: *Carpue* v. *London and Brighton Railway Company*; (1) *Latch* v. *Rumner Railway Company*. (2) The stationary train was not alleged to be in an improper place, but the cause of the collision was the train which ran into it; and it should have been proved either that this train belonged to the defendants, or was under their control. There is nothing to shew that it did not belong to one or other of the companies which have running powers over the defendants' line, or that it was not perfectly independent of the defendants' control. In the absence of evidence there is no presumption that in fact the train was the defendants', or under their management. The fact of the accident was not, under the circumstances, evidence of negligence: *Cornman* v. *Eastern Counties Railway Company*. (3)

KELLY, C.B. There are two questions arising in this case, one of which requires serious consideration as it does not seem to have been the subject as yet of direct judicial decision; the question, namely, whether, if one train runs into another on a railway of which a certain railway company are the possessors, but over which other companies have "running powers," it is to be presumed that the offending train is under the management or control of the company to which the railway itself belongs. I do not see how we can escape

(1) 5 Q. B. 747. (2) 27 L. J. (Ex.) 155, 5 Jur NS 657.
(3) 4 H. & N. 781; 29 L. J. (Ex.) 94.

the consideration of this question, because, although the evidence was obscure as to whether the train in which the plaintiff was, had stopped in a usual and proper place, no point was made at the trial on this ground. It was proved that many trains stopped habitually at the place where the plaintiff's train stopped, and it was not contended that the defendants had been guilty of negligence in this respect. We must, therefore, consider the question I have referred to.

Assuming, then, for this purpose that there was evidence of negligence on the part of the driver of the offending train, which is the second question in the case, I am of opinion that it is to be presumed in the absence of evidence to the contrary that the offending train either belonged to the defendants who are owners of the line, or was under their direction and control. A railway company is responsible for the safe conduct of trains and carriages within its own premises, and if a collision between those trains or carriages takes place, there is primâ facie a case of negligence against the company who have the control over them. But it is contended that where, as in this case, there are "running powers" possessed by other companies, there is nothing to shew that the train which did the mischief does not belong to one or other of them. In answer to this argument, however, it may be said that no train can pass over the defendants' line except under some arrangement with them or by their authority, and subject either directly or indirectly to their control. They alone know to whom any particular train belongs; and, moreover, the times and other regulations of its running, must be fixed by arrangement with them. And as they are bound to make provision that trains belonging to other companies should come at safe times, and at reasonable speeds, it can only be where their arrangements are insufficient, or are departed from, that there is negligence. But then to exonerate themselves from liability, the railway company ought to shew that the accident has happened not by their default, but in consequence of their arrangements not having been followed.

Therefore, in this case, one or other of these views must be taken. Either the train which caused the accident belonged to the defendants, in which case no doubt they would be liable, or else the train belonged to some other company running on the defendants' railway under the authority or direction of the defendants. Supposing the latter alternative to be the true one, it lay on the defendants to show that the accident did not occur through any fault of theirs, but that it arose from a violation of the arrangements made by them with the company to which the train belonged—a violation over which they had no control.

Then, secondly, if this be the true view of the case, was there any evidence of negligence? [The learned judge here referred to the facts of the case.] I thought the evidence was very slight, but still, under all the circumstances, it was for the jury to say whether the accident might have been prevented. On the whole, I was bound, I think, to leave the question to the jury. This rule must therefore be discharged.

MARTIN, B. I am of the same opinion. I have no doubt that if a nonsuit had been directed, and a bill of exceptions tendered, the Exchequer Chamber would have held that there was evidence to go to the jury. The facts of the case were these:—[The learned judge here recapitulated them] and the question is, whether these facts prove negligence. Now, no doubt, they ought not to have occurred. The collision which did take place ought not to have taken place. Then, what is the presumption as to the ownership of the train which caused the mischief? I think the jury might properly say that it was, in the absence of evidence to the contrary, under the control of the company to whom the line belonged. The fact is not "proved," perhaps, but "proof" of a fact is one thing and "evidence" of it to go to a jury is another. The law does not require absolute proof, but reasonable evidence. As to the case cited, *Cornman* v. *Eastern Counties Railway Company* (1), that does not seem to me to bear on the present case.

With regard to the question whether the jury were right or wrong in their finding, I express no opinion, but certainly the question could not have been withdrawn from their consideration. The rule to enter a nonsuit must accordingly be discharged.

PIGOTT, B. I am of the same opinion. A nonsuit in such a case as this would have been impossible. The facts proved shew negligence in some one, and the question is, whether the evidence

(1) 4 H. & N. 781; 29 L. J. (Ex.) 94. 5 Jur N.S. 657

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makes a primâ facie case against the defendants. Now the train which ran into the stationary train was on the defendants' premises, and therefore, unless the contrary is proved, we must, I think, assume it to have been under their control. Moreover, there is another aspect of the case which has not been much touched on. Why was the defendants' stationary train where it was? Or, supposing it to have been rightly there, why was not a signalman or guard sent back on the line to see that no collision should happen through the fog which was prevailing? To this question no answer has been given. I am clearly of opinion, therefore, that there was evidence of negligence. Whether the jury came to a right conclusion or not on that evidence, I offer no opinion. The case was unquestionably one which the judge was bound to leave to them.

Rule discharged.

Attorney for plaintiff: *Pulling.*
Attorney for defendants: *Freeland.*

May 1.

SINER AND WIFE *v.* THE GREAT WESTERN RAILWAY COMPANY.

Negligence—Railway Company—Train overshooting platform.

8 QB. 164-8
10 QB 272
2 QBD.
567-8-9

An excursion train, in which the plaintiffs (husband and wife) were passengers to Rhyl, arrived at Rhyl station, and, the train being a long one, the carriage in which they were overshot the platform. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform, nor was it, in fact, ever so backed, nor did it move until it started for Bangor. After waiting a short time, the husband, following the example of other passengers, alighted, without any request to the company's servants to back the train, or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in so doing strained her knee. There was a foot-board between the iron step and the ground, which she did not use, but there was no evidence of any carelessness or awkwardness in the manner of descent, except such as might be inferred from the above facts. In an action brought for this injury:—

Held (per Martin, Bramwell, and Pigott, BB.; Kelly, C.B., dissentiente), that there was no evidence for the jury of negligence in the defendants; and that the accident was entirely the result of the plaintiffs' own acts.

Foy v. *London, Brighton and South Coast Railway Company* (18 C. B. (N.S.) 225), distinguished.

Per Kelly, C.B., the stopping of the train at the station without any notice to

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the passengers not to get out was an invitation to them to do so; the descent at that place was dangerous, but not so clearly dangerous that the plaintiffs might not properly encounter the risk; and the company having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on, and the danger of getting out, they were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably.

affd in Ex Ch 4 Ex 117

ACTION by husband and wife.

Declaration:—First count, that the wife was received by the defendants as a passenger to be carried from West Bromwich to Rhyl, on the terms that defendants should use due care in and about carrying her, &c., and should at Rhyl station use due care in and about affording her reasonable facilities for alighting from the carriage in which she should be carried; that the defendants carried her to Rhyl, &c.; yet they did not at Rhyl station use due care in and about affording her reasonable and proper facilities to alight, by reason whereof, she, in alighting from the said carriage, strained one of her legs, &c.

Second count, claiming damages for the husband for loss of his wife's society, &c.

Pleas: 1. Not guilty. 2. That the wife was not a passenger. Issue.

The case was tried at the Shrewsbury spring assizes, 1868, before Keating, J. The facts were as follows:—The plaintiffs travelled by an excursion train on the defendants' line from West Bromwich to Rhyl, and arrived there in daylight. At Rhyl the train was too long for the platform, and the engine with the few front carriages overshot it. The plaintiffs were in one of these carriages, and their only way of alighting at the place where their carriage stood, was, either by jumping from the iron step to the ground (a distance of about three feet), or stepping from the iron step to the horizontal board, which runs along the carriage about half way between the step and the ground, and thence to the ground; the place they swore was awkward and dangerous. The passengers were not told to keep their seats, and the train never in fact backed into the station, nor moved at all until it started for Bangor. No porters were in sight; several persons got out of the carriage; and the husband then, without any communication with the defendants' servants, himself alighted. His wife, standing on the iron step,

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took both his hands as he stood below her, and jumped down, and in so doing strained her knee.

The learned judge ruled that there was evidence to go to the jury that the company intended the passengers in the carriages beyond the platform to get out at that place; he laid down that the defendants were bound to provide reasonable and proper means for passengers to get out; and he left to them the questions, whether reasonable and proper means for alighting were provided by the defendants, and whether, under all the circumstances, it was a reasonable and proper thing for the plaintiffs to get out of the carriage in the way they did.

The jury found a verdict generally for the plaintiffs for 300*l.*; leave being reserved to the defendants to move to enter a nonsuit or a verdict for them, on the ground that there was no evidence of negligence to go to the jury. A rule having been obtained accordingly, or for a new trial on the ground that the verdict was against the weight of evidence,

Huddleston, Q.C., and *J. O. Griffits*, shewed cause, and cited *Foy* v. *London, Brighton and South Coast Railway Company* (1), as precisely in point.

Powell, Q.C., in support of the rule, cited *Harrold* v. *Great Western Railway Company.* (2)

The arguments on both sides are fully noticed in the judgments of the learned Barons.

PIGOTT, B. I think that there was no evidence of negligence to go to the jury, and that the rule must be made absolute. On the train coming to a stop the passengers, and among them the plaintiff, got out where there was no platform, without any request to have the train put back into the station, and without giving any opportunity for its being done. Railway companies cannot have stations long enough for every train, and I can see no negligence in their stopping where they did. On the assumption that the place was dangerous, it is suggested that they should have had some one in attendance to warn the passengers not to descend. But why so? If a child were in question, it might be

(1) 18 C. B. (N.S.) 225.

(2) 14 L. T. (N.S.) 440.

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very proper to warn him of what was a very obvious danger, but people with ordinary ability and common sense travelling upon a railway must be taken to know what is dangerous, and what not. The duty of the passengers, if the place was, in fact, dangerous, was to request that the train might be put back, and this is a request that no station-master would venture to refuse, for he would know the risk he would incur if an accident happened through his refusal. On the other hand, no invitation to descend at that place was given by the company's officers, which distinguishes this case from that of *Foy* v. *London, Brighton, and South Coast Railway.* (1) I can therefore see no negligence in the company, and upon the circumstances of the case I am rather inclined to think with my Brother Bramwell, either that the accident was due to some awkwardness and carelessness in the plaintiff's mode of descending, or else that it happened in consequence of her being so constituted as to make it more than usually unsafe for her to travel, in which case it cannot be laid to the charge of the defendants.

BRAMWELL, B. I am of the same opinion. The plaintiff alleges that the defendants ought to have afforded her reasonable facilities for alighting, and that they did not do so, and that by reason thereof she was injured in alighting. I quite agree that they were bound to find her a proper place for getting out, but I cannot see that the accident has happened in consequence of their not doing so. For, first, I see no evidence that this was a dangerous place. The witnesses say it was dangerous, but they are not experts. The value of their opinion is to be measured by the facts they swear to, and I protest that to ordinarily constituted persons I can see no danger. If such a jump as this is made unskilfully and carelessly, or if it is made by a person who is lame, old, decrepit, or infirm, it cannot be said that the accident which follows is a consequence of any act or neglect of the defendants.

4 Ex. 121

Secondly, assuming that danger existed, and that there was not sufficient compliance on the part of the defendants with their duty to find a fit and proper place for alighting, where is the evidence that the plaintiff ever made any request to the defendants to put back into the station, or that if time had been given them they would not have done so? I cannot doubt that they would; but we may infer that that happened which always happens on such occasions: the passengers scramble out without waiting for any notice to descend, and if in consequence an accident happens they bring an action for it against the company.

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(1) 18 C. B. (N.S.) 225.

But, in the third place, if the place was dangerous, and the defendants would not put back, the plaintiff should have stayed in the carriage. Suppose it had stopped just against the parapet of a bridge, as has happened to myself, can there be any doubt that it would have been the duty of the passengers to stay in, and that they would have got out at their own peril? But the difference of the cases is only a difference in degree; the principle is the same in both. People do not consider that if in such a case they keep their places, and suffer an inconvenience in consequence, they have a remedy against the company.

4 Ex 121

Again let me apply this test. Suppose the defendants had covenanted with the plaintiff under seal to carry her to a particular place, and to provide proper means of exit from the carriage, and that the plaintiff, declaring upon the covenant, alleged a breach of contract, and then went on to say, per quod, I jumped from the carriage, and in so doing hurt myself. Would that be a per quod? Would it be damage legitimately flowing from the breach of contract? I think not. She could only say that her act was led or induced, not that it was caused, by their breach of contract. It could not be said that her jumping out was a legitimate consequence of their neglect, and it is none the more so because she sues in tort. The question has been argued as if it were one of contributory negligence; but it is not. The whole mischief resulted from the plaintiff's own act; and even assuming negligence in the defendants, that negligence was not the cause of the accident.

MARTIN, B. I am of the same opinion. First, I think there was no negligence in the defendants. For aught that appears, the platform was quite sufficient for the ordinary traffic at Rhyl, though not long enough for an excursion train; but on the plaintiff's contention it would be necessary for the defendants to have platforms long enough for excursion trains at every station. But, again, I agree with my Brother Bramwell that this is not a case of contributory negligence, but that the mischief was the consequence of the plaintiff's own voluntary act. There was no want of light. She thought fit to get out without any obligation on her to do so, but merely following other passengers, and the accident was wholly due to her own conduct. I also think that the case of *Foy* v. *London, Brighton and South Coast Railway* (1) is distinguishable.

KELLY, C.B. I think this rule ought to be discharged. It is not disputed that the company were bound by law to supply reasonably sufficient accommodation to enable the passengers to descend without danger. I by no means wish to express an opinion that they are bound to have a platform as long as every train, but they are bound to provide, whether it be by means of a platform or of a step, or in whatever other way, some mode in which the passengers may descend with safety from the carriage. It was a question of fact whether the ground was sufficiently near the step to make the descent a safe one, and it is suggested that there was no evidence that it was otherwise. But I think there was abundant evidence. Both the plaintiffs say that it was dangerous. It is true they do not say why, but it was open to the defendants' counsel to have cross-examined them on this point, and to have shewn affirmatively that it was not dangerous. It has been suggested that the distance of the step from the ground is about 3 feet, and that this distance makes the descent dangerous. There was no direct evidence as to this, but the distance was probably taken for granted on both sides, and it was open to the defendants to have shewn the real distance if it were otherwise. It was therefore entirely for the jury to say whether on the evidence this was more than such a reasonable distance as would have fairly secured the safety of the passengers, and this fact they must be taken to have found in favour of the plaintiffs.

If this is so, then the next question arises, which has been raised by my Brother Bramwell. It is said that the cause of the accident was not the distance, but the awkward and careless mode in which the plaintiff jumped down. This again was for the jury, but the

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(1) 18 C. B. (N.S.) 225.

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4 Ex 121

fair result of the evidence is, that though an adult male could have jumped down easily, yet a female passenger would encounter some danger in descending. But then the alternative is presented that if it was dangerous to descend she ought to have returned to her place in the carriage. I am clearly of opinion, however, that a railway company are not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he could lawfully be called on to choose; namely, either to go on to Bangor, or to take his chance of danger and jump out; and if they do so, the choice is made at their peril. I agree that if it can be clearly seen by the passenger that the act must be attended with injury, it may then be fairly contended that he is not entitled to choose this obviously and certainly dangerous alternative. But what were the facts in this case? The distance to be descended was three feet, and a lady might very reasonably say she would encounter the risk. Nine out of ten might have done it with safety; but on the other hand there was some danger, and such danger as the defendants were not entitled to expose her too. Although, if the danger were certain, as from a pit or a stream of water lying below, a passenger who alighted in the face of that risk would be the author of his own evil; yet when he is called upon to choose between two evils to which the neglect of the company has exposed him, and one of which presents some degree of danger, but not such as he may not without imprudence encounter, if in consequence of his adopting that alternative he suffers any injury, that injury is the proper subject of an action against the company; and such I think is the case here.

But it is further said that there is a third alternative, and that the plaintiff ought to have called on the defendants to back the train. I think she was not bound to do anything of the kind. If there was any danger, they were bound themselves to back it, and to have given notice to the passengers not to get out. If they failed to give that notice, the passengers had a fair right to assume that they would not back it. An act of negligence was already committed; and they were not discharged from their liability by the passengers not adopting a course they were not bound to adopt.

I should not, however, have thought myself justified in differing from my learned Brothers, had it not been for the case of *Foy* v. *London, Brighton and South Coast Railway Company* (1), between which case and the present I am unable to see any substantial distinction. The only point in which they are not identical is, that there the plaintiff was invited by an officer of the company to descend. But that raises the question whether, if the company stop their trains at a station, and no intimation is given that the passengers are to keep their seats, it is not in fact an invitation to them to get out. If there were any doubt on that point, the evidence in the present case shews clearly, that it was the intention of the company and part of their arrangements, that passengers in that part of the train which overshot the platform should there and then alight. After the train had once stopped, it never backed nor moved until it started for Bangor. Not only therefore was there evidence for the jury, but no jury could doubt that all passengers in those carriages which were beyond the platform were intended to get out there and then; but if there was any doubt on this part of the case, the question was left to the jury, and they have found for the plaintiffs. And if this was so, it was an invitation to all equally, to the old or infirm as well as to the young and vigorous.

There is one other point, which occurred also in *Foy* v. *London, Brighton and South Coast Railway Company.* (1) It appears there was a horizontal board running along the carriage underneath the step, and it is said the plaintiff might have descended by that, and that in not doing so, she was guilty of negligence. But this again was a question for the jury; and looking at the mode in which people usually descend, namely, by stepping down in front, and not by clambering sideways to the right or left, it cannot, I think, be considered negligence that she did not use it. I think, therefore, that the verdict of the jury is right, and that this rule ought to be discharged.

Rule absolute.

Attorneys for plaintiffs: *Field & Co., for Rankin, West Bromwich.*

Attorney for defendants: *J. Blenkinsop.*

(1) 18 C. B. (N.S.) 225.

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May 8.

WILLIAMS AND OTHERS *v.* THE SWANSEA CANAL NAVIGATION COMPANY AND OTHERS.

Costs—Costs of Opposing Private Bill in Parliament—Time for Application to Tax—Taxing Master's Certificate—28 & 29 Vict. c. 27, ss. 3 & 5.

8 QBD 10

By s. 1 of 28 & 29 Vict. c. 27, the petitioners against a private bill in Parliament are in certain cases entitled to recover costs against the promoters by the report of the committee. The third section enacts that "on application made to the taxing officer of the house by such petitioners, not later than six calendar months after the report of such committee, *and* not until one month after a bill of such costs shall have been delivered to the party chargeable therewith," the taxing officer shall examine and tax such costs:—

Held, that the one month to elapse after delivery of the bill of costs is a month previous to the application to tax, and that therefore an application made not later than six months from the report, but before one month from the delivery of a bill of costs, was informal, although more than one month elapsed between the delivery of the bill and actual taxation.

By s. 3, the taxing master's certificate is made conclusive evidence of the amount due and of the title of the party therein named to recover the same; and by s. 5, "the validity of such certificate shall not be questioned in any court:"—

Held, that these provisions apply only to certificates granted in accordance with the terms of the statute, and that the validity of a certificate based on an informal taxation might be questioned.

RULE, calling on the plaintiffs to shew cause why a certain declaration and a certificate of the taxing master of the House of Lords, filed by the plaintiffs, should not be taken off the file, and why the judgment signed thereon should not be set aside.

The plaintiffs were, in the session of 1866, petitioners before a committee of the House of Lords against a railway bill promoted by the defendants. By the report of the committee made April 19, 1866, the promoters were under 28 & 29 Vict. c. 27, s. 1, ordered to pay the costs of the petitioners incurred by them in relation to the bill. No specific sum was fixed by the committee.

The 28 & 29 Vict. c. 27, after providing for payment (s. 1) to petitioners against and (s. 2) to promoters of private bills, of their costs, to be taxed by the taxing officer of the House as thereinafter mentioned, enacts (s. 3), that "on application made to the taxing officer of the House by such promoters or petitioners, not later than six calendar months after the report of such committee, *and*,

see Lg. 5 Q 444.

in cases where no sum shall have been named by the committee, with the consent of the parties affected, not until one month after a bill of such costs shall have been delivered to the party chargeable therewith . . . the taxing officer shall examine and tax such costs, and shall deliver to the parties affected, on application, a certificate signed by himself expressing the amount of such costs . . . . . and such certificate shall be conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same from the party therein stated to be liable to the payment thereof." Section 5 enacts that the party entitled to such taxed costs may demand the whole amount so certified from one or more of the persons liable to the payment thereof, and in case of non-payment thereof on demand, may recover the same by action of debt, and, "in such action it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum mentioned in the said certificate, and the said plaintiff shall, upon filing the said declaration together with the said certificate, and an affidavit of demand as aforesaid, be at liberty to sign judgment as for want of a plea by nil dicit, and take out execution for the said sum so mentioned in the said certificate, together with the costs of the said action, according to due course of law; provided always that the validity of such certificate shall not be called in question in any court."

On the 8th of October, 1866, the plaintiffs made an application to the taxing master under s. 3. On the 10th they delivered a bill of costs to the promoters. On November 16, notice of taxation was given, and the costs were taxed, and a certificate given on the 30th. That certificate proved to be informal, and the plaintiffs, after the lapse of a considerable time, obtained another from the taxing master. Without issuing a writ they then filed a declaration under s. 5, together with the formal certificate, and an affidavit of demand, and on these signed judgment by nil dicit on the 16th of April last.

Henry James moved for a rule in the terms above mentioned, on the ground (amongst others) that the taxing master had no power to give the certificate, inasmuch as the application to tax had been made before any bill of costs had been delivered. Or, assum-

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ing that the time of actual taxation might be considered as that of "application," it was too late, for more than six months from the report of the committee had then elapsed. Section 3 requires the application to be "not later than six calendar months from the report, *and* not until one month after a bill of costs has been delivered." In this case, therefore, whichever be regarded as the critical period, that of formal application or that of *actual taxation*, the section has not been complied with. In the one case the applicant was too soon; in the other he was too late. [He was stopped.]

W. Williams shewed cause in the first instance. First: the true construction of the section is that the *application* must be not later than six months from the report, but that the *actual taxation* must not take place until a month after a bill of costs had been delivered, and in this case both these conditions were fulfilled. The six months need not include the one month.

[The Court (KELLY, C.B., MARTIN and BRAMWELL, B.B.) intimated their opinion that the application must be not later than six months from the report, *and* not until a month from the delivery of a bill. They, therefore, held the plaintiffs' proceedings to have been informal.]

Secondly: the validity of the certificate cannot be inquired into. The statute makes it conclusive.

[BRAMWELL, B. There can be no objection to the defendants' shewing that the taxing master had no jurisdiction, though otherwise the certificate would be conclusive.]

Henry James was not called on to support the rule.

KELLY, C.B. This rule must be made absolute. We cannot treat the certificate as valid, when it has been given informally. We should thus be conferring absolute power on the taxing officer of the House of Lords. To make the certificate available, it must be given in accordance with the act of parliament.

MARTIN, B. I am of the same opinion. We must apply the same rule to the taxing officer as we should to an arbitrator who made an award without jurisdiction. There is a decision of Lord Chancellor Westbury, moreover, on the meaning of the words "such deed" in the Bankruptcy Act, 1861 (s. 198), which supports the

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view I take of this case. (1) The certificate to be conclusive must be "such certificate," *i.e.*, one given in conformity with the statute.

BRAMWELL, B. The 5th section of the act which provides that the validity of the certificate shall not be called in question in any Court, must mean its validity when there was authority to give it.

Rule absolute.

Attorney for plaintiffs: *Wrentmore.*
Attorney for defendants: *Hacon.*

LANGLEY AND ANOTHER *v.* HAMMOND.

May 6.

Easement—Ways "used, occupied, and enjoyed"—Surrender, Construction of.

7 Eq 581
6 Ch 170, 169
10 QB 360,
5 Ch D 697
780
11 Ch D 96
5 CPD 37
18 Ch D 4
619, 621

A lessee surrendered to his lessor, the defendant, a part of the demised premises, "together with all ways, &c., therewith now used, occupied, and enjoyed," with a proviso that the defendant should fence off the premises surrendered from those still occupied by the lessee. The premises so surrendered consisted of a strip of ground, forming part of a farmyard, with some farm buildings upon it, and was bounded on one side by land owned and occupied by the defendant, and on the other by a hard gravelled roadway, made across that portion of the open farmyard still occupied by the lessee, from a gateway in the street up to the opposite fence. There had always been unity of seisin and of occupation of the whole farmyard, and this roadway had been made and used by former occupiers of the yard, and by the present lessee, for the convenience of carting heavy loads to and from the yard and the farm buildings. There was no existing approach to the premises surrendered from the defendant's land, and a road constructed for that purpose would have to pass through the defendant's pleasure ground:—

Held, that no right to use this roadway as a means of access to the surrendered premises passed to the defendant.

Per Kelly, C.B., that, by a grant of hereditaments, with all "ways therewith now used, occupied, and enjoyed," those ways only pass which have at some former period been used as of right therewith.

Thomson v. *Waterlow* (Law Rep. 6 Eq. 36) followed.

TRESPASS quare clausum fregit.

Seventh plea, claiming a right of way under a surrender made to the defendant by the plaintiffs' lessor before the lease to the plaintiffs. Issue thereon.

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(1) The decision referred to is *Ex parte Morgan* (1 D. J. & S. 288; 32 L. J. (Bkr.) 15).

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The cause was tried before Bramwell, B., at the last spring assizes for Bucks, when the following facts were proved:—The defendant, Mrs. Hammond, was owner in fee of a house and pleasure ground, situate in West Street, Great Marlow, which she occupied herself, and also of adjoining premises, which included a farmyard on which were erected various outbuildings. By indenture of lease, dated the 23rd of April, 1861, she demised these adjoining premises to Calvert for a term of twenty-one years, and Calvert, on the 8th of June, 1866, assigned the residue of his term to Fowler. The defendant wishing to regain possession of that portion of the premises which immediately adjoined her pleasure ground for the purpose of making a kitchen garden, Fowler, by deed indorsed on the original lease and dated the 5th of November, 1866, surrendered to her "all the said buildings and pieces of ground described in the said plan drawn on the back of the within written indenture of lease, and therein coloured pink; the boundary fences of the said hereditaments hereby surrendered adjoining to land and premises in the occupation of the said C. Fowler to be made, and during the remainder of the said term of twenty-one years kept in good repair by the said Sarah B. Hammond, her executors or administrators, or by the person for the time being the owner of the house and garden adjoining, now in the occupation of the said S. B. Hammond; *together with all ways*, profits, commodities, and appurtenances whatsoever to the said hereby surrendered hereditaments and premises belonging, and *therewith now used, occupied, and enjoyed*; . . . to have and to hold in as full, ample, and large a manner to all intents and purposes as the said C. Fowler, his executors, &c., could or might have held, occupied, or enjoyed the same." The portion so surrendered was a strip of ground forming part of the farmyard, and some of the farm buildings stood upon it. It was separated from the defendant's pleasure ground, on the east, by a fence. The entrance to the farmyard was in West Street, to the north, and from the entrance gate straight across the open yard and terminating at the opposite hedge, on the south, in which there was no gateway or means of exit, was a hard gravelled roadway used for carting the farm produce into the yard and for the more convenient access to the buildings thereon. The surrendered strip was bounded on the west by this roadway, and, before the surrender, was open to it. Up to the date of the surrender there had always been unity of seisin and unity of occupation of the whole farmyard.

After the surrender, Fowler, by a lease dated the 6th of November, 1866, to which the defendant was an assenting party, underlet a portion of the demised premises, including the remainder of the farmyard, to the plaintiffs. The defendant, on being let into possession, pulled down the farm buildings on the surrendered strip, and converted it into a kitchen garden; and, in compliance with the condition in the surrender, made a boundary fence alongside the roadway, separating the part surrendered to her from the part demised to the plaintiffs; but she claimed the right to have a gateway in this boundary fence, and to use the whole length of the roadway as an access to it. She had no other means of getting to the surrendered strip with a cart except by this roadway, unless she made a road on purpose through her private garden and pleasure ground. The plaintiffs refused to allow her to use the roadway, and, on her insisting on using it, brought this action.

On these facts, the learned judge directed the verdict to be entered for the plaintiffs, and reserved leave to the defendant to move to enter the verdict for her, the decision of this Court to be final.

Bulwer, Q.C., having obtained a rule nisi to enter the verdict for the defendant on the seventh plea, on the ground that the right of way claimed passed to the defendant by the deed of surrender of the 5th of November, 1866,

D. Brown (*Keane, Q.C.*, with him) shewed cause. Previously to the surrender by Fowler, the land surrendered and that over which the way is claimed were both in the possession of Fowler. At that time, therefore, no right of way existed, but the owner's use of the way was only the exercise of his ordinary rights of property. Therefore, if any right of way was acquired by the defendant, it must have been, not by the conveyance of an existing easement annexed to the land surrendered, but by the creation of a new one. There are no express words of grant in the surrender, and the right is claimed only under the general words, "all ways, &c., therewith used and enjoyed," on the authority of cases in which such words have, under certain circumstances, been held to confer on the grantee of land a right of way which did not exist at the time of the conveyance. But this case is distinguishable on two grounds, first, that there is here no definite, well-marked road, but only a farmyard track; secondly, that in all the cases relied on, with one exception, there had at one time existed a right of way, which had become merged or suspended by unity of possession, and which was held to revive when the properties were again separated. Both these distinctions, but especially the latter one, were relied on by the Master of the Rolls in the recent case of *Thomson* v. *Waterlow* (1), where his lordship, under circumstances similar to those of the present case, held that no right of way passed; and that case shews the limitation that is to be placed on the proposition laid down in Gale on Easements, pp. 76, 77 (3rd ed.), and the cases there cited. The only case in which general words have had the effect of giving to the grantee of land a right of way which neither existed at the time of the conveyance nor had previously existed, though thus suspended, is the case of *Kooystra* v. *Lucas* (2); but in that case it appears on the facts, though it is not explicitly stated, that the way must have been a way of necessity; for it was a way to a portion of an inclosed yard, the only access to which for vehicles was through the gateway between the houses. In the present case, however, there is no such necessity, for the piece of land surrendered adjoins the grounds of the defendant. But, again, if any right of way was conferred by the surrender, it was only a right to the nearest point of the strip of land surrendered, whereas the defendant claims a right to go along the plaintiffs' land up to the extreme end.

Bulwer, Q.C., and *Merewether*, in support of the rule. It is clear upon the evidence that a roadway did in fact exist at the date of the surrender, and had existed as long as the witnesses could remember, as the road by which carts approached the various buildings in the farmyard, including those on the portion surrendered to the defendant, and was kept in repair for that purpose, and it was not the less a road by reason of its not being fenced on either side. It is clear also that it was at the date of the surrender "used, occupied, and enjoyed," with the hereditaments

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(1) Law Rep. 6 Eq. 36.

(2) 5 B. & A. 830.

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surrendered. Reading then the surrender with reference to this state of facts, and to the situation of the property, was it the intention of the parties that the right to use this road should pass? The words of the surrender are to be read most strongly against the surrenderor, and effect is to be given, if possible, to every word. In this case there was no other way to which the language of the surrender could apply. "Indeed, these words are as much a description of the thing granted as if the way had been set out by its termini." Gale on Easements, 77, (3rd ed). Moreover, if the surrenderee had been any other than the owner of the adjoining land, this road would have been the only means of access to the surrendered premises. It is difficult to suppose that the parties intended that because the defendant was the owner of adjoining land she should not use this road, but that every load of manure and of refuse to and from her kitchen garden was to be carted by some new road to be made in front of her drawing-room windows across her pleasure ground. The proviso that the defendant should make a boundary fence is not inconsistent with the intention to pass the right claimed, for the gate is part of the fence. If then the intention of the parties to pass the right to use this road can be gathered from the deed, is there any rule of law to prevent the Court from giving effect to that intention? It is said that, inasmuch as the defendant was unable to shew that the way claimed was ever in point of law "appurtenant" to the premises surrendered, it will not pass under the words used in this deed, and *Thomson* v. *Waterlow* (1), is relied on. But in that case the Master of the Rolls was both judge and jury, and having quà jury once determined, as he did, that no defined way had ever existed or been used in point of fact, it was unnecessary for the decision of the case to go further. It is clear that if the way in the present case had ever, no matter how long ago, been "appurtenant" to the demised premises it would have passed. But there seems no reason for saying that if at some time it has been "appurtenant," it will pass by the description "used and enjoyed therewith," but that it will not pass by that description if it has never been "appurtenant," although it may have been "used and enjoyed therewith" continuously for hundreds of years; and all that the Master of the Rolls can have meant is,

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(1) Law Rep. 6 Eq. 36.

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that where no *right* of way has at any time existed, the party relying on these general words must make out a stronger case on the facts to evidence the intention to confer the right, than he need make out where the right has once existed. To say that general words can under no circumstances confer the right, except where a right has before existed, is contrary to the authorities. The law has been clear and well established from very early times. In *Bradshaw* v. *Eyre* (1), it was held that a right of common was extinguished by unity of ownership of the dominant and servient tenements, and could not be *revived* again; but that in a demise of the land to which, &c., with all commons "occupat' vel usitat' cum predicto messuagio," these general words amounted to "a good grant of a *new* common." The same law is to be found in *Shury* v. *Piggott* (2), "a way or common shall be extinguished (by unity) because they are part of the profits of the land," per Whitlocke, C.J. (3), and in Bro. Abr. Extinguishment et Suspencion, pl. 15, it is said that the way is not revived on a severance of the tenements, but it is "*novel* chimin." So also where an easement has become extinct by unity of ownership, it will not pass upon a severance of the tenements unless the owner "uses language to shew that he intended to *create* the easement *de novo*," per Bayley, J. in *Barlow* v. *Rhodes*. (4) And that intention may be shewn by the use of the words "therewith used and enjoyed": *James* v. *Plant*. (5) See also *Wardle* v. *Brocklehurst*. (6) It is true that in most of the cases in which the question has arisen there had at one time existed an easement in point of law, but if it be that the old right in those cases had been extinguished and could not be revived, and that the right conferred by the words "therewith used and enjoyed," was a *new* right, the doctrine cannot be restricted, as the plaintiffs contend, to those cases only. Such a restriction is not only inconsistent with the principle on which those cases were decided, but with the decision in *Kooystra* v. *Lucas* (7); with the language of Holroyd, J. in *Harding* v. *Wilson* (8); and with the arguments and judgments in *Barlow*

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(1) Cro. Eliz. 570.

(2) Popham, 166.

(3) Popham, at p. 170.

(4) 1 C. & M. at p. 448.

(5) 4 A. & E. 749.

(6) 29 L. J. (Q. B.) 145. 6 Jur N. S. 82

(7) 5 B. & A. 830.

(8) 2 B. & C. at p. 100.

v. *Rhodes* (1), all of them cases in which no right had previously existed. See also *Morris* v. *Edginton.* (2) As to the suggestion that the way in *Kooystra* v. *Lucas* (3), must have been a way of necessity, it is strange, if it were so, that such an answer did not occur either to the counsel or to the Court. But the decision did not proceed upon that ground, nor could it, for a lessee who has an access from the back-door of his house to a yard behind it cannot build a stable and coach-house on the yard, and then claim a way of necessity for horses and carriages across his lessor's land. The reasoning on which that case and other cases of that class proceed is that the words "used or enjoyed therewith," which otherwise have no significance, are inserted, as they in fact are, for the very purpose of conveying what has no legal existence; and this argument is of equal force whether there has or has not been at some previous period a right which exists no longer. At the utmost the fact that the right once existed can only be evidence of the intention; that fact may be quite unknown to the parties, in which case it can have no weight at all; but what really influences their intention is the visible material fact of an existing way constantly used as the mode of access to the land conveyed, and necessary for its most convenient enjoyment. As to the argument that if the defendant takes any right of way under the surrender, it is only a right to the nearest point of the strip of land surrendered, no such objection was made at the trial; and if she is entitled to use any part of the road, she is entitled to use the whole of it so far as it bounds the strip surrendered to her.

Kelly, C.B. This rule must be discharged. [After stating the facts of the case, the Chief Baron proceeded]:—I do not enter into the question of how far this was a defined fixed road. Though it is spoken of as a hard gravelled road, it seems to have been more properly a track; but at any rate it was a way along which persons occasionally passed from West Street to the land containing the buildings. The question is this; there never having been a time, previously to the surrender of 1866, when the two pieces of ground were owned and used by different persons, so as to make it possible for a right of way in a strict sense to exist, but the way having only been used for the accommodation and at the pleasure of the owner of both properties, was a right of way, upon the severance of the properties by the conveyance or surrender of 1866, created or passed by law by virtue of general words, which we may take as being the largest and most extensive that could have been used? I am of opinion that it was not. The law resulting from the numerous and complicated cases to which we have been referred, is simply this:—When the owner of a piece of land has a right of way over adjacent land, so that he may maintain at any time an action for an obstruction, if afterwards by inheritance or purchase both pieces of land come to one and the same owner, the right is necessarily at an end, the enjoyment thenceforth being the mere exercise of a right of property on his own land. But if, at a later period the properties again fall into the ownership and possession of different persons, and in the conveyance of the land to which the way was formerly attached, the words are found "together with all ways, &c. used or enjoyed therewith;" the effect of these words is to revive the right that formerly existed, and which has been not extinguished, but only suspended. But since it does not appear here that at any antecedent time there existed a right over one of these pieces of land, attached to the other piece of land, the effect of these words cannot make or revive a right of way that never before existed.

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(1) 1 C. & M. 439. (2) 3 Taunt. 24.
(3) 5 B. & A. 830.

10 QB 367,
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I need not examine the authorities at length; the effect of them may be correctly gathered from the judgment of the Master of the Rolls in *Thomson* v. *Waterlow* (1), which relieves me from the necessity of considering them in detail. The learned judge there says, after referring to the case of *James* v. *Plant* (2), "There is, it appears to me, a distinction between the user of a way which has been made by the owner of adjoining and contiguous closes, and a right of way which previously to unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties. I do not think that the judges in *James* v. *Plant* (2), intend to lay down that the words of conveyance in that case, or in the present, would constitute the grant of a right of way where the user had sprung

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(1) Law Rep. 6 Eq. 36.

(2) 4 A. & E. 749.

solely from the convenience of the person who held both tenements, and which convenience ceased to exist when the severance between the closes took place." And the same observation applies to all the cases cited for the defendants, except the one to which I am about shortly to refer. Further on, the Master of the Rolls says: "I think that this case, therefore, must depend upon the circumstances, whether there was a road used before the vendor held the property. In other words, whether it was an old road which became merged by the unity of their possession, or whether it was simply a road used for their own convenience in managing the property." These words are precisely applicable to the present case.

I will now refer to the case of *Kooystra* v. *Lucas* (1), which was especially relied on by Mr. Bulwer. It certainly does not appear clearly from the report of that case whether any legal right of way existed before unity of possession, but if the facts are narrowly looked at, they are seen to have no resemblance to those of the present one. There a passage running between two houses, Nos. 71 and 72, Oxford Street, led to a yard behind those and several adjoining houses, including Nos. 69 and 70, the houses leased to the plaintiff; and it does not appear whether, antecedently to the plaintiff's lease, that passage was not used by the inhabitants of these houses for the purpose of obtaining access to the back of their premises. The yard, however, or the greater part of it, appears to have been leased to another person, who had the right of going through the passage to all parts of the yard so occupied by him. Under these circumstances the plaintiff took from the owners of the whole property a reversionary lease of Nos. 69 and 70, "as the same were then in the occupation of the plaintiff and one Catherine Bagerley, and as delineated on a plan, with all ways, passages, &c., to the premises belonging or therewith, or with any part thereof, used and enjoyed;" and the plan included a piece of ground forming part of the yard behind, which had not before belonged to either of the two houses. Subsequently to this lease, the lessors granted to the person through whom the defendants claimed, a lease of the residue of the yard. The defendants under this subsequent lease attempted to prevent the plaintiff

(1) 5 B. & A. 830.

10 QB 370

from having access to the portion of the yard so leased to him through the passage, which the previous occupant of that portion of the yard, and possibly also the inhabitants of the houses, had been accustomed to use. But here there never was any such thing as a way used of right, or at all, by any person, except the person occupying the farmyard; it was merely a way in common parlance, which could not without express words be converted into the way of right claimed by the defendant. I am of opinion, therefore, that this rule ought to be discharged.

Martin, B. I am of the same opinion. [After stating the facts of the case and the terms of the surrender, the learned judge proceeded]:—Do these words give the defendant a right to the use of this way or track, which seems to have been in some degree made hard and used for driving carts or cattle up the farmyard? I think not. The deed expressly provides that the defendant shall make a fence to separate the place taken back by her from the adjoining land, but notwithstanding this she contends that the general words "all ways, &c.," effect the same result as an express grant in terms of a way from the gate up to this piece. If I had to decide the question for the first time, whether it was intended that these words should have that effect in law, I should say that it was not intended. But I am not called on to pronounce a decision on the point of law, for the judgment of the Master of the Rolls is in point and determines the question.

10 QB 364.
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Bramwell, B. I also think this rule must be discharged. I am not prepared to say, and I do not understand the Master of the Rolls to have decided, that a right of way could not pass under words such as those here used, even though there had always previously been unity of ownership and of possession. And should the case arise, I should like for time to consider before I assented to the doctrine supposed to have been laid down. Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the

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right to use that road, not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is, that there is here really no defined road. It is said that it is hard and gravelled, but in truth as soon as you turn out of West Street, you do not come into what is a road and nothing else, kept for no other purpose, but into a rick-yard, where the occupier could, and no doubt did, go in any particular direction he desired. But this is not a way of such a definite kind as will pass under general words; it is no more a way (if I may use the illustration), than the short cut a man may take across his room from the piano to the fireplace, is a way. In one sense, no doubt, it is a way which he may use, but he only uses it equally with ways in other directions, by virtue of his rights of possession, not because there is any road made there, but because it is the shortest cut to the place he wishes to get to.

Another ground is this, that, assuming any way to exist, it would be merely a way up to the nearest part of the adjoining land, but the defendant claims to go through the whole piece to the extreme end. As these grounds are in my judgment sufficient, I will not entangle the case by a consideration of the other questions raised.

Rule discharged.

Attorney for plaintiffs: *W. Legh, for T. J. Reynolds, High Wycombe.*

Attorney for defendant: *J. Indermaur.*

1868
Feb. 7.

[IN THE EXCHEQUER CHAMBER.]

NORTH STAFFORD STEEL, IRON AND COAL COMPANY (BURSLEM), LIMITED, *v.* WARD.

5 Ex 215-6

Company—Power to commence business—Whole Capital subscribed for.

A clause in the articles of association of a company registered under the Companies Act, 1862, provided that in case the whole of the shares into which the nominal capital of the company was divided should not be subscribed for or allotted, the registered members of the company for the time being should, *if the directors should by resolution so declare*, be and continue associated for the objects thereof; and the regulations for the management of the company should be in force and binding on such members in like manner as if the whole of the shares into which the nominal capital was divided had been subscribed for and allotted, and the business of the company might be commenced from that time:—

Held, that, until the whole of the capital was subscribed for or allotted, or the directors had passed a formal resolution for continuing the company, the directors had no power to make a call, and a call so made could not be recovered against a shareholder. (1)

Action for a call.

Plea, that the company is a company registered under the Companies Act, 1862, and according to their articles of association duly made and registered, &c., in case the whole of the shares into which the nominal capital of the company is divided should not be subscribed for or allotted, the registered members of the company for the time being should if the directors should so declare, *but otherwise should not*, be and continue associated for the objects thereof, and the regulations for the management of the said company should, *but otherwise should not*, be in force and binding on such members, in like manner as if the whole of the shares into which the nominal capital is divided had been subscribed for and allotted, and the business of the said company might be commenced from that time, *but otherwise might not;* that at the time of the making of the call the whole of the shares into which the nominal capital is divided had not been subscribed for or allotted, and the directors had not made any such resolution as aforesaid, and the call was made by the directors contrary to the articles of association, and without their having any authority to make the same, and that at the time of making the same the defendant was a registered member of the company, and the defendant never consented to the making of the call. Issue thereon.

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(1) This case was decided at the sittings in error after Hilary Term, and is now reported in connexion with the following case of *Ex parte Ward*, post p. 180.

The action was tried before Bramwell, B. at the London sittings after Easter Term, 1866, and a verdict was found for the plaintiff, subject to a special case, which stated the following facts:

The plaintiffs were duly incorporated on the 24th of January, 1864, under the Companies Act, 1862; and their articles of association contained the following clause:—

Art. 9. "In case the whole of the shares into which the nominal capital of the company is divided shall not be subscribed for or allotted, the registered members of the company for the time being shall, if the directors shall by resolution so declare, be and continue associated for the objects thereof; and the regulations for the management of the company shall be in force and binding on such members in like manner as if the whole of the shares into which the whole of the nominal capital is divided had been subscribed for and allotted, and the business of the company may be commenced from that time. After the directors shall have allotted any number less than the whole of such shares, they shall have power to allot the remainder thereof, or any part of the same, from time to time as they shall deem fit, on such terms and conditions as such directors shall determine. All premiums which may be realized on the issuing of such shares, or of any additional or other shares, which may hereafter be issued in accordance with these articles, shall be the property of the company."

On the 13th of February, 1864, the defendant applied for twenty shares, which were, on the following 12th of April, allotted to him, and were still held by him.

The nominal capital of the company was 200,000*l.*, divided into 10,000 shares of 20*l.* Only 4004 shares were ever subscribed for, and no express resolution was passed under the 9th article, that the company should continue associated for the objects thereof; but the company commenced business on the 12th of April, 1864, and continued to carry it on, and to employ clerks, servants, and workmen, without any objection from the shareholders until after the making of the call now sued for. Two calls were made by the company, and were paid by the defendant as well as by the other shareholders, and the defendant during the whole time that he was a shareholder, lived near the company's works, and was aware that the business was being proceeded with. He did not, however, then know that the directors had not passed a resolution for the continuance of the company according to the 9th article, but though he had perused the articles of association, he had never asked for information on that point.

The defendant having afterwards obtained information which made him dissatisfied with the position of the company, he refused to pay a third call which was made upon him, and this action was accordingly brought.

The case was argued before the Court of Exchequer, in Easter Term, 1867, and the Court gave judgment for the defendant. From this decision the plaintiffs appealed.

Hayes, Serjt. (*Gibbons* with him), for the plaintiffs. The effect of the clause is rather affirmative than negative, and therefore the negative averments in the plea are not proved. By the ordinary rules of construction, without negative words, the usual powers of the directors to carry on business and make calls, which they possess of common right and by statute (see 25 & 26 Vict. c. 89, sch. table B), cannot be taken away, and the clause must therefore be treated not as requiring a resolution as a condition precedent to their exercising these powers, but only as permissive, enabling the directors to justify their proceedings by recording a formal vote, without resorting to a general meeting, or at the utmost only as directory: *Ornamental Pyrographic Woodwork Company, Limited,* v. *Brown* (1); *Re Strand Music Hall Company, Limited* (2); *Knight's Case.* (3) But even if a resolution be held a condition precedent to the commencement of general business, yet the directors must carry on business to some extent in launching the company and getting the shares taken up. For this purpose they must incur expenses, and to meet these preliminary expenses they must have the power to make calls. That power is not in terms excluded by the 9th clause, and it must therefore be held to exist. To hold otherwise, would be to make the company a self-contra-

9 Jur ns. 578

(1) 2 H. & C. 63; 32 L. J. (Ex.) 190.

(2) 3 D. J. & S. 147.

(3) Law Rep. 2 Ch. 321.

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diction; a difficulty that did not exist in *Fox* v. *Clifton* (1), and *Pitchford* v. *Davis* (2); for there the company never properly existed, but under the limited liability acts the company exists as soon as it is registered.

Macnamara, for the defendant. None of the cases cited are in point. In *Ornamental Pyrographic Woodwork Company, Limited,* v. *Brown* (3), there was no such clause in the articles of association as occurs here, but the company was governed (as appeared by the declaration) by Table B of 19 & 20 Vict. c. 47. The plea, which was held bad on demurrer, merely stated that the whole capital was not subscribed, treating the question as though a company formed under the limited liability acts was in the same position as companies formed under the old law, where, as in the cases cited, the completion of the company by a full subscription was held an essential element in the contract of each member: *Fox* v. *Clifton.* (4) In *Re Strand Music Hall Company, Limited* (5), the directors were authorized to borrow by a resolution of an ordinary general meeting, and the decision of the Lords Justices was only that the power to borrow in this mode given them by a clause in the articles was not overridden or limited by another clause, giving power to borrow on the resolution of an extraordinary general meeting. In *Knight's Case* (6), although there was no formal entry of a resolution to forfeit the shares, the Lords Justices held that such a resolution must be presumed to have been made from their finding other entries which implied its existence. But it is here found as a fact that there has been no resolution, and a resolution is absolutely required. To treat the clause as merely enabling the directors, if they please, to record a resolution, would be to deprive it of all its significance and force; its object is, not to exonerate or justify the directors, but to protect the shareholders, by requiring a distinct consideration of the question and a vote upon it. It is introduced for the purpose of limiting the power which they would otherwise, according to the decision in *Ornamental Pyrographic Woodwork Company, Limited,* v. *Brown* (3), possess; the very course suggested by Pollock, C.B. in his judgment

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(1) 6 Bing. 776.

(2) 5 M. & W. 2.

(3) 2 H. & C. 63; 32 L. J. (Ex.) 190.

9 Jur. NS. 578.

(4) 6 Bing. 776, 797.

(5) 3 D. J. & S. 147.

(6) Law Rep. 2 Ch. 321.

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in that case. (1) Neither is it possible to distinguish the power to conduct general business from that to make calls; the whole structure of the clause shows that it is as much applicable to the one as to the other.

Hayes, Serjt., in reply.

Willes, J. I am of opinion that the judgment of the Court of Exchequer ought to be affirmed.

The defendant relied in answer to the action, not upon the bare fact that all the shares which it was agreed should form the capital of the company were not subscribed for,—which plea would probably have failed, and we see no reason for dissenting from the judgment of the Court of Exchequer in the case of *Ornamental Pyrographic Woodwork Company, Limited*, v. *Brown* (1);—but upon the fact that there is an express clause in the articles of association of this company which did not exist in that case. This article is the 9th, the terms of which are, "In case the whole of the shares into which the nominal capital of the company is divided shall not be subscribed for or allotted, the registered members of the company for the time being shall, if the directors shall by resolution so declare, be and continue associated for the objects thereof."

Now what do these words mean? They mean nothing unless they mean that in case the whole of the shares into which the nominal capital of the company is divided shall not be subscribed for or allotted, the registered members for the time being shall not, until the directors shall by resolution so declare, be and continue associated for the objects thereof, except in so far as the latter part of the clause authorizes the directors to exercise that part of their powers which relates to the allotting of further shares.

My Brother Hayes refers to the doctrine that affirmative words are not to be construed as taking away what is incident by common right, and that affirmative words in a general act are not to be construed as taking away a special power given by an act of parliament dealing with a particular subject, and he desires us to apply that rule to the case, and to assimilate the power of directors to carry on business to what is called common right, or an act of parliament dealing with the particular subject.

(1) 2 H. & C. 63; 32 L. J. (Ex.) 190. 9 Jur N S 578

I need hardly say that there is no common right in the matter. If one were to refer to common right one would look to the common law, and the case would be governed by the rule laid down in *Fox* v. *Clifton* (1) and the numerous cases which followed it, from which it appears that subscription for the entire contemplated capital is a condition for commencing business. A common right is therefore out of the question.

Then is there any special legislative provision with reference to this matter, to which the directors could have resorted if the provision of the 9th article had not been agreed to? In one sense there is, because there is such a provision in the model set of articles at the end of the statute; but then, by the terms of the statute, that model set of articles is only to operate if the subscribers shall not have thought proper to deal with the subject for themselves by their articles.

The proper rule to apply therefore is, not that affirmative words will not take away what is incident of common right, or that words introduced for the purpose of enlarging are not to be construed so as to restrain (which is perhaps a corollary from the first rule); but the ordinary rule, that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined: expressio unius est exclusio alterius.

A further reason for the application of this rule in the present case will be found as we go on with the article: "And the regulations for the management of the company shall be in force and binding on such members in like manner as if the whole of the shares into which the nominal capital is divided had been subscribed for and allotted."

At one time I thought it possible that a distinction should be drawn between the power of making calls on shares, and the power to carry on the business of the company, because calls might be required to pay preliminary expenses though it would be improper that they should be applied to carrying on the business. But this general provision is followed by a specific provision with reference to carrying on the business of the company, excluding any such distinction, for it goes on, " and the business of

(1) 6 Bing. 776.

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the company may be commenced from that time." There is, therefore, a conditional power to carry on the business of the company from the time of the resolution being made, accompanied by a provision or regulation for the management of the company, which shall be in force and binding upon the like condition.

It is impossible, therefore, to maintain any such distinction, and the defendant appears to me to be well founded in contending that the former and general part of the clause includes those provisions for the management of the company which deal with the making of calls. And this is not at all, as my Brother Hayes would treat it, a matter of form; or if it be, it is one of those forms to which Lord Stowell referred when he said that some forms are of the essence of the transaction; without the form the transaction cannot have any effect given to it.

Next, can it be alleged that the fact of the directors making a call is substantially equivalent to their coming to a resolution that the company's business shall be continued? Now, though we cannot find any express provision that notice shall be given of what is to be done at a meeting when such a resolution should be come to or call made, yet we must give credit to directors for being honest people, with a desire to carry out the business in a regular way. If a very small number of directors happened to be present at a meeting where it was proposed to pass a resolution that the business of the company should be carried on, notwithstanding that an obviously insufficient number of shares to make that course honest were subscribed for, we must suppose there would be a chance that among the directors one, at least, and probably a majority, would be found to protest that so important a resolution ought not to be brought forward, except at a meeting called with notice. The shareholders have a right to the protection which may be given them by the formal consideration of a resolution formally brought forward and formally arrived at; whereas the notice that the directors would proceed to consider a suggestion for making a call, might not bring to the minds of those present the necessity that before doing so there should be a resolution declaring that the business of the company should be proceeded with, notwithstanding the full number of the shares had not been subscribed for. That involves not merely the

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making of the particular call, but the continuance of the company as a working company.

This view seems to be further confirmed by the express power given to the directors by the concluding paragraph of the 9th article, to do certain matters, notwithstanding all the shares shall have been allotted. "After the directors shall have allotted any number less than the whole of such shares, they shall have power to allot the remainder thereof, or any part of the same, from time to time as they shall deem fit, on such terms and conditions as such directors shall determine. All premiums which may be realized on the issuing of such shares, or of any additional or other shares, which may hereafter be issued in accordance with these articles, shall be the property of the company." What is to be done in case those terms involve a loss is not stated. We are asked to superadd to this that when the directors shall have allotted or placed any number of shares, they shall have not only power to allot the remainder of the shares, but that they shall have the further power, notwithstanding no resolution has been passed, to make calls upon the shareholders.

I think, in the absence of authority, that the judgment of the Court of Exchequer was right. There is an absence of authority upon the point, for in the case of *Ornamental Pyrographic Woodwork Company, Limited*, v. *Brown* (1), there is the distinction which has already been pointed out, that there was nothing equivalent to the 9th article. In *Knight's Case* (2), the decision of the Lords Justices was founded upon the conclusion that there was a resolution, although that resolution was not formally entered. But in the case now before us we are informed that there was no express resolution, and we cannot see that there was any resolution in any other form.

I think, therefore, that the judgment of the Court of Exchequer was right, and that it ought to be affirmed.

BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

Attorney for plaintiffs: *A. E. Francis.*

Attorneys for defendants: *Ingle & Goodby.*

(1) 2 H. & C. 63; 32 L. J. (Ex.) 190. 9 Jur NS 578.

(2) Law Rep. 2 Ch. 321, at pp. 325, 327.

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April 30.

Ex parte WARD. Re NORTH STAFFORD STEEL, IRON AND COAL COMPANY (BURSLEM), LIMITED.

5 Ch 977
5 Eq [illegible]-6, 217-8
7 Eq 278 281
9 Eq 665
9 QBD 467
App Cas 650

Rectification of Register—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s*. 35.

A shareholder in a company whose articles of association contained a clause prohibiting the directors from carrying on the business of the company or making calls, until all the shares were taken up, except after a resolution to continue the company, successfully resisted an action for calls, on the ground that the whole of the shares were not taken up, and that no such resolution had been passed. He then applied under s. 35 of the Companies Act, 1862, to have his name removed from the register:—

Held, that the power of the Court to remove a shareholder's name from the register only existed in the two cases of his name having been improperly entered, and of his having ceased to be a member; and that neither circumstance occurred here. The application was therefore refused.

Application to the Court under s. 35 of the Companies Act, 1862, by a shareholder in the North Stafford Steel, Iron and Coal Company (Burslem), Limited, to remove his name from the register. Art. 9. of the company's articles of association provided that, in case the whole nominal capital of the company should not be subscribed for or allotted, the registered members of the company should, if the directors should by resolution so declare, be and continue associated for the objects thereof; and that the business of the company might commence from that time. The applicant, being sued in this Court for calls, had successfully resisted the action, on the ground that the capital had not been subscribed for, and that no such resolution of the directors as required by the articles had been passed; and the decision of this Court was affirmed by the Exchequer Chamber. (1) The company was now being wound up in Chancery.

Hayes, Serjt., and *Gibbons*, shewed cause against the rule. The right of the applicant to have his name removed is not decided by the result of the action for calls. To avail himself of the 35th section of the Companies Act, 1862, he must bring himself within its terms, and he can neither shew that he was improperly put on the register, nor that he has ceased to be a member.

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(1) See *North Stafford Steel, Iron and Coal Company* (*Burslem*), *Limited*, v. *Ward*, ante p. 172.

The Court called on

Macnamara to support the rule. Though it was not formally decided by the Court of Exchequer Chamber that the applicant is not a member of the company, it is practically decided, for he is held to be not liable to calls. But the only way in which a member of a limited liability company can be made liable is by the medium of a call; if, therefore, he is not liable for calls, he is liable for nothing. If this is so, to retain his name on the register is merely vexatious, and his application ought to be granted. It would be otherwise if he had by any negligent conduct on his part, or by acquiescence, disentitled himself to the relief he seeks, but no such conduct can be shewn: *Kincaid's Case* (1); *Ward and Henry's Case* (2); *Sichell's Case.* (3)

KELLY, C.B. The only power possessed by the Court of removing the applicant's name from the register of the company is that conferred by s. 35 of the Companies Act, 1862. That power is only given under certain circumstances, and before we make the order we must be satisfied that these circumstances exist. First, then, has the applicant's name been put on the register "without sufficient cause?" If he had been induced by fraudulent misstatements or fraudulent suppression to become a member, and thereupon his name had been entered on the register, that entry would have been without sufficient cause. But what are the facts? The company was incorporated with a contemplated capital of 200,000*l.* early in 1864, and in February of the same year, at a time, therefore, when comparatively few of the shares could have been taken up, he applies for and obtains an allotment of twenty shares. There is no statement in his affidavit that he did not at that time know that the whole capital was not subscribed, or that no such resolution as contemplated by article 9 had been passed. But further, he must in fact have known that the whole capital was not subscribed, for there are very few of such enterprises in which the capital is subscribed otherwise than by slow degrees. And he must also be taken to have known in fact that no such resolution had been passed, for it was obviously not intended that this should be done except in the event of its being found impracticable to raise the whole capital contemplated, a point which could not in the nature of things have been at that time ascertained. There was, therefore, no suppression or misrepresentation. Looking at this clause then, what was its effect, and was there anything in it to prevent his being put upon the register so as to be rendered liable as a member of the company? It is evident that the provision was inserted for the benefit both of the public and the shareholders, to prevent the commencement of business by the company, or the undertaking by them of any large liabilities, until the whole of the capital had been subscribed, except under the sanction of an express resolution of the directors. And if before that time, and without any such resolution, the company or the directors had proceeded to enter on general business, or to incur such liabilities, it would have been competent to any shareholder to apply to a court of equity for an injunction to restrain them. But to suppose that it was intended that in the meantime they should not be at liberty to incur any debts whatever is to suppose an impossibility. They must issue prospectuses and advertisements; they must have a registered office, and premises of some description in which the preliminary business of the company may be carried on; and they must employ clerks to conduct this preliminary business. To some amount, therefore, they must be competent to contract debts, and a shareholder knowing this state of things cannot complain if his name is put on the register, so that on the failure of the undertaking he with others who have taken the chances of a prosperous adventure, may become liable for its losses; and if this applicant may now deny his liability, so may every shareholder, except perhaps the seven who originally signed the memorandum and articles of association. His name, therefore, was not improperly placed upon the register; and that is really the only question before us, for it has not been contended that anything has happened by which, if he was at any time a shareholder, he has ceased to be so. Our decision in no way conflicts with the decision of this Court and of the Exchequer Chamber in the action for calls, which only decide that until the whole capital is subscribed or a resolution passed, the company cannot exercise their general powers nor make calls for the payment of debts.

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(1) Law Rep. 2 Ch. 412, 426.

(2) Law Rep. 2 Ch. 431.

(3) Law Rep. 3 Ch. 119.

MARTIN, B. If it were shewn to us that any liability of the company existed to the payment of which this applicant was liable, we ought not to interfere; for if we take his name off the register, we take away from the liquidator the means of enforcing payment. Now the Court of Exchequer Chamber has decided that the company could not contract any business debts, nor make any calls for their payment; but it is said that other debts may have been contracted for which the applicant is liable. If any such debts exist we ought not to make this order; but I think we ought to be informed of that fact, and if there are none such, I should be disposed to aid the applicant in ridding himself of shares on which no one can fasten any liability. I do not differ from what has been said by the Chief Baron, but I should myself have preferred to inquire whether there were any outstanding debts to which the applicant was liable, and if there were none which could be enforced against him, then I doubt whether we ought not to make the order.

CHANNELL, B. I think there can be no reasonable doubt that this rule ought to be discharged. We are called on to decide the question upon motion, and we must be satisfied that the applicant brings himself distinctly within s. 35 of the Companies Act, 1862. It is assumed that the Exchequer Chamber has decided this question, but that is not so; they only decided that in an action for calls, the defendant was entitled to defend himself on the ground that the whole capital had not been subscribed, and that no resolution had been passed as required by the 9th clause of the articles of association. I am bound by that decision; but the question here is quite different, and is simply, first, has the applicant's name been properly inserted in the register, and, secondly, has he ceased to be a member of the company. I cannot see that his name has been improperly inserted; the argument that would prove it so, if pushed to its legitimate length, would shew that the company could make no register at all until all the shares were subscribed for. But it is said that though the form of the decision in the Exchequer Chamber does not determine the matter, yet the ground of the decision does, for it shews that no calls can ever be made on him, and that therefore he is subject to no liability as a member.

But the decision does not go that length. It only decides that the plaintiffs could not recover the calls there sued for. Has, then, any act been done to make him cease to be a member? The carrying on the business of the company without sufficient capital cannot have that effect, for they might have so carried it on with a resolution of the directors. The want of such a resolution may be a good defence to an action for calls to pay debts so contracted, but to remove a name from the register is to decide indirectly a larger question. The true effect of the words used by the Lords Justices in the cases in Chancery is, that if the applicant shews a clear right to have his name put on or taken off the register, then, as the result of determining this question, the Court will ministerially exercise the power of rectifying the register; but the right must first be established.

PIGOTT, B. The present applicant does not bring himself within either branch of the alternative mentioned in the statute, and, therefore, though I should be glad to assist him if he is really not liable as a member of this company, we have no power to remove his name. Debts may have been contracted under such circumstances as to give rise to a question between the creditors and the shareholders, and we ought not now to embarrass those questions by altering the register.

KELLY, C.B. I wish to add that I quite concur with my Brother Martin in thinking that it would be better that we should be informed, in cases like the present, whether there are any creditors of the company, and if so, of what nature, and to what amount.

Rule discharged.

Attorneys for applicant: *Ingle & Gooddy.*
Attorney for company: *A. E. Francis.*

DE MATTOS *v.* NORTH.

1868
May 5.

Marine Insurance—Policy on Profits—Illegal Policy—"Without benefit of Salvage"—19 *Geo.* 2, *c.* 37, *s.* 1.

A policy on profits is within 19 Geo. 2, c. 37, s. 1, and if made "without benefit of salvage," although "free from average," it is avoided by the statute.

Smith v. *Reynolds* (1 H. & N. 221; 25 L. J. (Ex.) 337) followed.

4 Wh III C6
2 C.P.D. 379.
380-1,-4

Declaration: 1st count, on a policy of insurance made by the plaintiff through his agent with the defendant, on profit on coals shipped on board the *Ceylon*, valued at 1000*l.*, *warranted free from all average, but without benefit of salvage*, the premium being fifteen guineas per cent.; the declaration averred that the coals were shipped, and that the plaintiff was, at the time of the commencement of the risk and the effecting of the insurance, and thence until and at the time of the loss, interested in the subject matter of the insurance to the value and amount of all the moneys ever insured thereon; and averred a total loss during the continuance of the policy, performance of conditions precedent, and breach by non-payment.

2nd count, on an open policy between the same parties, upon profits on coals shipped on board the *Ceylon*, *warranted free from all average, and without benefit of salvage;* the premium being fifteen guineas per cent. nett; and the other averments in the first count being repeated.

Plea 7, to the 1st count, that the ship in the policy mentioned was before and at the time of the making of the policy, and during the whole of the voyage and adventure, a British ship.

Plea 15, to the 2nd count, the same.

Plea 8, to the 1st count, that at the time of the making of the policy, there was attached thereto a memorandum of agreement, signed by the defendant, which was intended to form, and did form, part of the contract of insurance, by which memorandum the defendant agreed with the plaintiff, that in the event of loss, the production of the policy should be deemed full and sufficient proof of interest; averring that the ship was a British ship.

Plea 16, to the 2nd count, the same as the 8th plea, except that it alleged the memorandum to provide that, "in the event of any claim arising on the said policy, the production of the said policy should be deemed a sufficient proof of interest, being against total loss only."

Demurrers to the 7th, 8th, 15th, and 16th pleas; and joinder.

Sir W. B. Brett, Q.C., (*S. G.*) (*C. A. Russell* with him), in support of the demurrers. The statute (1) only applies to a policy on ships or goods, not to a policy on profits. So far as concerns the words "without benefit of salvage," they have no application to a policy on profits free from average, and may therefore be struck out. With respect to the 8th and 16th pleas, which allege that a memorandum incorporated in the policy a provision that the production of the policy should be deemed sufficient proof of interest; the intention of the statute was only to prevent the effecting of policies where no interest actually existed; it therefore nullified any stipulation that no further proof of interest than the policy should be required, but did not render illegal and void a policy containing those words, where an interest to the full amount actually existed; and such an interest is here alleged to have existed, and the averment is not denied.

Butt (*Wheeler* with him), contrà. The case of *Smith* v. *Reynolds* (2), in this Court, has decided that the statute applies to a policy on profits, as well as to a policy on ship or goods; and has decided it with reference both to the illegal words set out in the declaration, and to those which the 8th and 16th pleas disclose. The statute is directed against the form of the policy, as the best method of

(1) 19 Geo. 2, c. 37, s. 1, after reciting that "the making of assurances, interest or no interest, and without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war, ... and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances hath been perverted," &c.; enacts, that "no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty, or any of his subjects, or on any goods, merchandises, or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes."

(2) 1 H. & N. 221; 25 L. J. (Ex.) 337.

striking at the practice it condemns, and it is therefore immaterial whether, in a policy on profits, the words "without benefit of salvage" can or cannot have any application. Their insertion, however, leads to the inference that they may operate, and in fact they can; for if there were a constructive total loss of the goods in the course of the voyage, it is conceivable that they might be recovered and sold at a price realising, after all deductions, a profit.

C. A. Russell, in reply. The case of *Smith* v. *Reynolds* (1) was decided entirely on the provision that production of the policy should be proof of interest, and not on the words "without benefit of salvage." It is clear that these words can have no significance in a policy on profits where it is made free from average; for a total loss is the only case in which the assured can recover on the policy. But if anything exists on which the clause could attach the loss must be only constructively total, and the benefit of salvage must arise from the abandonment of the goods. But the goods could not be abandoned unless there were an underwriter on goods, and they then must be abandoned to that underwriter, who would be entitled to whatever the goods realised, including profits, which are a mere excrescence of the goods. But if there be no underwriter on goods, still there can be no abandonment to the underwriter on profits, for his contract is not altered, nor are his rights made more extensive by the absence of an insurance on the goods. He can take nothing by abandonment, except what he has assured, and he has not assured the goods; he cannot therefore take the goods, and as a consequence, he cannot take the profits. (2)

Martin, B. This is a policy on profits on goods shipped on board

(1) 1 H. & N. 221; 25 L. J. (Ex.) 337.

(2) With the demurrer there was also argued a rule to enter the verdict for the plaintiff, obtained on leave reserved to the plaintiff upon a nonsuit on the trial of the issues of fact. The question was intended to be raised on the traverse of the 8th and 16th pleas, whether a memorandum wafered to a policy, and called an honour slip, containing the provision that production of the policy shall be deemed sufficient proof of interest, but which is not understood or intended between the parties to have a binding legal force, is or is not part of the policy so as to bring it within 19 Geo. 2, c. 37, s. 1. It being conceded, however, that the verdict must be entered for the defendant on the 7th and 15th pleas, and those pleas going to the whole action, the Court pronounced no judgment on this point.

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DE MATTOS *v.* NORTH.

a ship belonging to a subject of her Majesty, and is made "without benefit of salvage;" therefore, by the very words of the statute, 19 Geo. 2, c. 37, it is null and void to all intents and purposes. The case of *Smith* v. *Reynolds* (1) is a direct authority that a policy on profits is within the statute; and the only answer that could be given to that case was, that it was decided entirely on the words occurring in the policy there sued on, "that the policy should be a sufficient proof of interest." But in my opinion, there were in that case two separate and independent grounds of objection; the words I have referred to, and the words "without benefit of salvage;" and it is plain that the judgment of the Court puts the decision upon both grounds. I think that judgment was right, and I adhere to and follow it.

As to the 8th and 16th pleas, they state that a memorandum, which formed part of the policy, provided that the production of the policy should be deemed a sufficient proof of interest, and they also state that the ship was a British ship. On demurrer we must take this as it is stated, and so taken, it states a policy which is expressly avoided by the statute. The defendant, therefore, is entitled to judgment on the demurrers to the 8th and 16th, as well as to the 7th and 15th pleas.

BRAMWELL and PIGOTT, BB., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *Elmsley, Forsyth, & Sedgwick.*
Attorneys for defendant: *Westall & Roberts.*

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(1) 1 H. & N. 221; 25 L. J. (Ex.) 337.

SHEPHERD *v.* THE BRISTOL AND EXETER RAILWAY COMPANY.

1868
May 5.

Negligence—Railway Company—Duration of Transit—Completion of Contract of Conveyance—Liability of Company as Carriers—Delivery by Carriers.

The plaintiff delivered to the defendants, as common carriers, some cattle to be carried by them to their London station. The cattle arrived on a Sunday morning between 11 and 12 o'clock, but owing to certain police regulations the plaintiff was unable to take them away before 12 o'clock at night. Meanwhile, they were placed by the defendants' servants, with the sanction and assistance of a man employed by the plaintiff to receive them, in pens at the station. Early on the Monday morning when the plaintiff's servant went to take them away, he found that two steers had been killed. He wished to take away the remaining cattle, but was refused permission unless he signed a receipt ticket for the whole number, which he declined to do. Later in the day the plaintiff came and removed them, but before he could reach the market at Islington for which they were intended, it was over, and he could not sell them until the Thursday following. In an action for the value of the two steers which were killed, and for the damage done to the remaining beasts by delay:—

Held (per Bramwell and Channell, B., Martin, B., dissentiente), that the defendants' liability as carriers had ceased when the alleged loss and damage occurred.

Per Martin, B., that the defendants still had possession of the cattle as carriers, and were liable as such, when the two steers were killed; and that there had been a wrongful refusal on their part to deliver to the plaintiff's servant on the Monday morning, for the consequences of which they were also responsible.

Declaration, that the plaintiff caused to be delivered to the defendants, as and being carriers of goods by railway for hire, certain beasts of the plaintiff to be by them taken care of and carried from a certain place to Paddington and there delivered for the plaintiff within a reasonable time, and the defendants received the said beasts for the purpose and on the terms aforesaid, and although all conditions, &c., yet the defendants neglected for a long and unreasonable time to deliver the said beasts, whereby the plaintiff lost some of the said beasts and a market for the sale of the residue, and the same became of less value, &c., and further, the defendants did not take due and proper care of the said beasts whilst the same were in their custody, and by reason thereof two of the said beasts were killed and lost to the plaintiff.

Pleas: 1. Not guilty. 2. Traverse of the delivery of the beasts 3. That after the said beasts were delivered to and received by the

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SHEPHERD *v.* BRISTOL AND EXETER RAILWAY CO.

defendants, and before a reasonable time for carrying and delivering the same and before any breach of duty by the defendants, the plaintiff exonerated and discharged the defendants from all obligation to deliver and take care of the said beasts, and from delivering and taking care of the same, and the defendants then did what is complained of by the plaintiff's leave. 4. As to so much of the declaration as relates to the neglect of the defendants to deliver within a reasonable time, that the defendants duly carried the beasts to Paddington and there tendered them for delivery to and for the plaintiff, who refused to receive them, and the defendants were always ready and willing to deliver the said beasts but the plaintiff was not ready and willing to receive them, whereby the defendants were prevented from delivering them within a reasonable time, as they otherwise would have done. Issue thereon.

The plaintiff is a cattle dealer in Somersetshire, and on Saturday, the 5th of January, 1867, twenty steers and two heifers were by his orders delivered to the defendants to be carried to the station used by them in London, being that of the Great Western Railway Company at Paddington. The cattle were in two lots, one of which was despatched from the Williton station and the other from the Bridgewater station. In the consignment note for the former lot the plaintiff, the consignee, was described as "James Shepherd, London;" and in the latter as "James Shepherd, Islington Market, London." The cattle were in fact intended for the Monday's market at Islington, but of that the defendants had no notice beyond the above description of the plaintiff. The cattle ought to have arrived at Paddington about 7 o'clock on Sunday morning, but owing to circumstances for which the defendants were admitted not to be responsible, they did not in fact arrive until between 11 and 12 o'clock. The plaintiff, who had come to London on the Saturday, had been at the station early in the morning, and on the recommendation of Mr. Nicholls, the foreman of the Great Western Railway Company, had engaged a man named Ward to drive the cattle to Islington. On their arrival it was not possible for Ward, who was at the station to receive them, to go at once with them to Islington, in consequence of a police regulation which forbids cattle to be driven through the streets of London on Sunday between 10 A.M. and midnight. After being taken from the trucks in which they had travelled, they were put into pens on the premises of the Great Western Railway Company by Nicholls with Ward's assistance, and there the plaintiff, on his return about 1 o'clock P.M., found them. He then bought some hay of Nicholls for them, and left again after directing Ward to bring them away immediately after midnight. Between 12 and 1 o'clock on the Monday morning, Ward, in pursuance of his orders, went to fetch them, but he found that two had been killed. He wished to take away the remaining twenty, but one Alexander, another servant of the Great Western Railway Company, would not allow him to do so unless he signed a receipt for the whole twenty-two, which he declined to do. The remaining cattle therefore remained in the pens until the plaintiff himself came later in the day and obtained an order for their removal. He drove them straight to Islington, but was too late for the market, and was unable to sell them until the Thursday following. They were damaged 1*l.* each by the delay, and the two which were killed were worth 30*l.*

The cause was tried before Keating, J. at the Somersetshire summer assizes, 1867, and the jury, on proof of the above facts, found a verdict for the plaintiff for 53*l.* 9*s.*, being 20*l.* for damage from delay, 30*l.* for the value of the two beasts killed, and 3*l.* 9*s.* for expenses of feeding, &c. Leave was reserved to move to enter a verdict for the defendants on the ground (amongst others) that the contract was determined and the cattle delivered before the alleged breach, and that the defendants were discharged from performance before breach; or to reduce the damages by one or other of the two sums of 30*l.* and 23*l.* 9*s.*, the Court to have power to draw inferences of fact.

A rule nisi was obtained accordingly, against which

Feb. 7. *Coleridge, Q.C.*, *Saunders* and *Murch* shewed cause. The defendants are liable for the damage claimed in respect of the cattle which were killed, for it occurred before delivery to the plaintiff had been completed. His drover was at the station, but exclusive charge of the cattle was not given to him, and that being so, his mere presence cannot make any difference to the common law liability of the company: *Rooth* v. *North Eastern Railway*

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Company. (1) The cattle whilst in the pens were still under the control of the servants of the Great Western Company, who must be taken to be the agents of the defendants: *Muschamp* v. *Lancaster and Preston Railway Company.* (2) And not only was there no delivery on the Sunday, but there was a refusal to deliver to the plaintiff's drover on the Monday morning unless he would sign a receipt for the whole number of animals, which he properly declined to do. The result was that the surviving beasts were too late for the Islington market, and according to the finding of the jury, were deteriorated by the delay. The defendants had sufficient notice of their destination to bring the case within the rule laid down in *Hadley* v. *Baxendale* (3), that damage to be recoverable must be within the contemplation of both parties.

Sir J. B. Karslake, Q.C. (A.G.), Prideaux, Q.C., H. T. Cole, Q.C., and *J. Digby,* supported the rule. The liability of the defendants, as carriers, ceased when the cattle were placed in the pens. Whilst there they were at the owner's risk or at that of the Great Western Railway Company: *Wise* v. *Great Western Railway Company* (4); or, if the defendants remained responsible, it was as warehousemen and not as carriers: *Garside* v. *Trent and Mersey Navigation Company.* (5) In the latter case they are not liable for the loss of the two beasts which were killed. There was no evidence of negligence, and the case is not one in which "res ipsa loquitur:" *Smith* v. *Great Eastern Railway Company.* (6) Nor are they liable for the injury caused by delay to the surviving cattle. The damage under this head was really for loss of market, but for this even as carriers the defendants would not be responsible, not having had notice of the day of the market, and as warehousemen they are not liable for any consequential damage: *Henderson* v. *North Eastern Railway Company.* (7)

Cur. adv. vult.

May 5. The Court differing in opinion, the following judgments were delivered:—

BRAMWELL, B. The plaintiff complains of a breach of duty or

(1) Law Rep. 2 Ex. 173.

(2) 8 M. & W. 421.

(3) 9 Exch. 341. 18 Jur 358.

(4) 1 H. & N. 63; 25 L. J. (Ex.) 258.

(5) 4 T. R. 581.

(6) L. R. 2 C. P. 4.

(7) 9 W. R. 519.

contract by the defendants as carriers. This is the form and substance of the complaint. The question is not whether he has some cause of complaint against some company or person, but whether he has a cause of complaint against the defendants as carriers. The defendants say he has not, that nothing more remained to be done by them under their contract as carriers, when the alleged damage occurred. This is the question, and it seems to me better to put it thus, than to inquire whether the cattle had been delivered to the plaintiff; as that gives rise to a variety of nice questions as to whether there was such a delivery as to involve loss of lien, or such a delivery as to constitute an acceptance. Had the defendants anything more to do as carriers after 2 o'clock on the Sunday? It seems to me clear they had not. I think the argument of the Attorney-General irresistible. The cattle arrived, were taken out of the trucks safely; the plaintiff's servant was there, and had it not been Sunday, would at once have driven them away. But being Sunday, and being liable to a fine if he drove them on that day through the streets, he was permitted to put them into a pen, where he fed them and shut them up. He was helped by, or helped, the servants of the Great Western Railway to put them in the pens. They might have refused him permission to do so; had he chosen to risk the fine, he would not have left them. Had there been pens belonging to A. B., communicating with the station yard, the cattle might have gone there. What difference is there that the pens belong to the Great Western Railway and that no charge was made? Supposing he had just driven the cattle out and then brought them back? Or, suppose next time he is told just to drive them round the yard so as to make sure there is a delivery to him?

If there is any evidence of a refusal to deliver on the Sunday, which I doubt, nevertheless I as juryman cannot find such refusal. I entirely agree with the case of *Muschamp* v. *Lancaster and Preston Junction Railway Company* (1), and think this quite consistent with it. In my opinion, the rule should be made absolute. I have to add that my Brother Channell concurs in this judgment.

MARTIN, B. This was an action against the defendants as common carriers to recover damages; first, for the value of two steers

(1) 8 M. & W. 421.

which were killed, and, secondly, for damages to other cattle occasioned by the conduct of the Great Western Railway Company, for which it was alleged by the plaintiff the defendants are responsible. The facts were these, as they appear from the judges' notes :—On Saturday, the 5th of January, 1867, the plaintiff sent by the defendants' railway twenty steers and two heifers, which were intended for the Islington Market on Monday, the 7th. The cattle ought to have arrived at Paddington Station about 7 A.M. on Sunday, but did not, in fact, arrive till between 11 and 12 A.M. Before they arrived the plaintiff went to Paddington and saw Nicholls, the foreman of the Great Western Railway Company, who named a man named Ward who would drive the beasts to Islington. When the cattle arrived the plaintiff was not at the station, but Ward was, and assisted Nicholls to take the cattle from the trucks and put them into pens, and that I consider material, as it is expressly stated in the evidence that the Great Western men put them in the pens and Ward only assisted them. At a quarter to 1 the plaintiff returned to the station and found the cattle in the pens. When the plaintiff first went in the morning he had been told by Nicholls that after 10 o'clock the cattle could not be driven through the streets, and in consequence he bought some hay from Nicholls, which he directed Ward to give to the cattle, and was again told that the cattle could not be taken away till after 12 P.M. He then left, having directed Ward to bring the cattle away at 12 P.M. Between 12 and 1 on the Monday morning Ward went for the cattle, but found that two had been killed. He desired to take the remaining twenty but would not be permitted to do so unless he signed for the lot, that is, the whole twenty-two. This he refused to do, and in consequence was refused to be permitted to take away the cattle. The result was that the plaintiff himself went in the morning of Monday and procured an order for the delivery of the twenty surviving beasts, and they arrived at the cattle market about 10, but the market was then over and they could not be sold until the following Thursday, and evidence was given that the cattle were damaged 1*l.* each by the delay. At the trial it was objected, first, that certain conditions protected the defendants, and, secondly, that at Common Law the defendants were not responsible. The jury found a verdict for the plaintiff for 53*l.* 9*s.*, which was

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assumed to be 20*l.* for damages to the surviving beasts, 30*l.* the value of the two steers which were killed, and 3*l.* 9*s.* for expenses. Leave was given to the defendants to enter a verdict for them or to reduce the damages, the Court to have power to draw inferences of fact. The defence on the condition failed, and the question entirely depends upon the Common Law liability. Two points were made on behalf of the defendants. First, that upon the arrival of the cattle at Paddington the liability of the defendants was at an end, and that thenceforth it was a matter between the plaintiff and the Great Western Railway Company. I do not agree to this. When two railway companies are connected in business together so that one of them receives cattle to be conveyed over the line of the other, I think there is but one contract, and that it is made between the customer and the receiving railway company, and that their liability is just the same as if they had been the owners of the railway the whole way upon which the cattle are to be conveyed, and that their liability as carriers does not end until there has been a delivery in what is the ordinary and usual way. This I have understood to be the law ever since *Muschamp* v. *Lancaster and Preston Railway Company* (1), and, in my opinion, it should be steadily adhered to. The departure from it would lead to endless disputes and questions of shifting liability.

The second point was, that the cattle were delivered to the plaintiff. This is a pure question of fact, and in my opinion they were not delivered either actually or constructively. The plaintiff was at the station to receive them in the morning when they ought to have arrived, and when they might lawfully have been driven away. They did not arrive until after 10 o'clock, after which they could not lawfully be removed from the railway station until midnight. The plaintiff was not at the station when they did arrive, and Nicholls, the foreman of the Great Western Railway Company, put them into pens. The plaintiff came a second time, at a quarter to 1 o'clock, and all that he did was to purchase some hay from Nicholls, and direct Ward, the drover, to feed the cattle, and to bring them away to the market at 12 o'clock. Ward went shortly after 12 o'clock, when Alexander, another servant of the

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(1) 8 M. & W. 421.

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Great Western Railway Company, refused to permit him to take away the twenty surviving cattle unless he signed a paper which he was under no obligation to sign, and the cattle were not delivered to the plaintiff until too late to enable them to be driven to the market during the time of business. Until the delivery to the plaintiff there was no actual delivery, and indeed the servants of the Great Western Railway Company, whom I consider to be the agents of the defendants, insisted upon keeping possession of them. I also think there was no constructive delivery. The learned counsel for the defendants have failed to point out what it was, or when it was made, and in my opinion the cattle were in the possession of the agents of the defendants as common carriers when the two steers were killed, in which case they would be clearly liable for their value, and also that the wrongful refusal to deliver the surviving cattle to Ward was an act done by an agent of the defendants for which they are responsible. I therefore think the plaintiff entitled to recover, and that the rule should be discharged.

Since I have written the above I have read an article, "The Termination of the Carriers' Responsibility," in a book written by Dr. Redfield, the Chief Justice of Vermont, in the United States, Vol. II., p. 50. It seems to me very ably written, and paragraphs 7, 8, 9 bear distinctly upon the present case, and seem to me to confirm my view. The rule there laid down is that the responsibility of the carrier, as such, does not terminate until the owner or consignee, by watchfulness, had, or might have had, an opportunity to remove his property, and more especially when the goods arrived out of time, in consequence of which it became impossible for the owner to lawfully remove them. This rule seems to me founded upon reason and justice and good sense, and directly to apply to the present case.

Rule absolute.

Attorney for plaintiff: *Bishop.*

Attorneys for defendants: *Elsdale & Byrne, for Fussell & Pritchard, Bristol.*

[IN THE EXCHEQUER CHAMBER.]

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May 14.

PERRYMAN *v.* LISTER.

False Imprisonment—Reasonable and Probable Cause—Hearsay Evidence.

Where a person having received information which causes him to suspect another of a felony, which has in fact been committed, gives him into custody without availing himself of a ready and obvious mode of ascertaining the truth, the absence of inquiry is an element in determining the question of the existence of reasonable and probable cause.

3CP. 322

The defendant, upon whose premises a felony had been committed, acting on the faith of information given to him by his own coachman, the most material part of which was derived from one Robinson, a neighbour's coachman, gave the plaintiff into custody on the charge, without making any personal inquiry of Robinson. The plaintiff having brought an action of false imprisonment, the judge who tried the cause directed the jury that on that state of circumstances, there was no reasonable and probable cause, and a verdict was given for the plaintiff. The Court of Exchequer Chamber (affirming the decision of the Court of Exchequer), refused to disturb the verdict on the ground of misdirection.

Revd 4 HL. 521.

Declaration, that the defendant assaulted and beat the plaintiff, and gave him into custody to a policeman, and caused him to be imprisoned in a police-office and elsewhere for a long time, and afterwards to be brought in custody before certain justices on a charge of felony, who, having heard the said charge, dismissed the same, and discharged the plaintiff out of custody, and by reason, &c.

Plea, that before and at the time, &c., a rifle of defendant's had been and was feloniously stolen, taken, and carried away, and that defendant had good and probable cause to suspect and did suspect the plaintiff to have been guilty of the said felony, upon the following grounds, that is to say, that the plaintiff was in the habit of coming to the defendant's premises, and had opportunities of seeing where the rifle was usually kept; and on or about the 4th of March, in this year, the plaintiff came to the premises of the defendant, and while there took up the said rifle, and stated that he should like to have it; and that the said rifle was missed on or about the 11th of March from the defendant's premises, and had not been seen after the said 4th of March in the place where the same was usually kept on the defendant's premises; and according to the statement of one William Robinson, on the faith of which the defendant acted, the plaintiff had the said rifle in his possession away from the defendant's premises a short time, to wit, four days after the said 4th of March; wherefore, &c.

Issue thereon.

The case was tried at Westminster, at the sittings after Trinity Term, 1867, before Kelly, C.B., and the following evidence was given:—The plaintiff lived with his father, who was a butcher and publican at Ruislip, and the defendant was a gentleman of property in the neighbourhood. A rifle, the property of the defendant, was missed from his harness-room, on the 11th of March, 1867. The plaintiff had been in the habit of going to the defendant's premises, and on the 4th of March he had been there, and seeing the rifle, had said in the presence of Hinton, the defendant's coachman, that he should like to have one like it. On the 7th or 8th of March one Robinson, the coachman of a neighbouring gentleman, saw a gun, which he swore was the defendant's rifle, lying in the plaintiff's father's barn, and said to plaintiff, "What are you doing with Lister's gun?" to which the plaintiff replied, "It is not Lister's gun; it is my gun." The plaintiff had for some time had in his possession an old gun, which he had used for shooting sparrows, and he swore that this was the gun seen by Robinson. On the 11th of March, after the rifle had been missed, the plaintiff came to the defendant's premises, and there saw Hinton in the presence of Robinson. There Hinton said to the plaintiff that he had heard from Robinson that Robinson had seen the rifle in the plaintiff's barn; the plaintiff denied that the rifle had been there, and asked Hinton and Robinson to come down, and he would shew them the gun which Robinson saw. They accordingly went to the barn with the plaintiff, who shewed them a gun, which was not the defendant's rifle, and which Robinson then said was not the gun he had seen before; the plaintiff replied that it was, and went away. This gun was produced at the trial, and was admitted not to resemble the defendant's rifle.

The defendant gave evidence that, having heard of the loss of the rifle, he saw Hinton on the subject on the morning of the 12th of March, and was informed by him that he had received information from Robinson that Robinson had seen the rifle with the plaintiff in the plaintiff's barn; that this statement had been repeated by Hinton to the plaintiff in Robinson's presence; that Hinton and Robinson had been to search the plaintiff's barn with the plaintiff, but that they had not found the rifle, and had been shewn another gun by the plaintiff, which was not the gun seen by Robinson, though the plaintiff said it was. The defendant further swore that before he gave the plaintiff in charge he had seen Robinson, and ascertained that Robinson had seen the rifle in the plaintiff's barn, and that he had asked Robinson if he could possibly be mistaken about it, and that Robinson had stated that he could not. Robinson, however, denied that he had spoken to the defendant on the subject prior to the arrest. The defendant further proved that he had acted, in giving the plaintiff in charge, on the faith of the statements made to him by Hinton and Robinson.

The Chief Baron directed the jury, that if the defendant did receive the communications that he spoke to from Hinton and Robinson, and believed their statements, that would constitute reasonable and probable cause; but if the defendant had acted on the statement of Hinton only, and did not see Robinson before he gave the plaintiff into custody, then that would be no reasonable or probable cause, and their verdict must be for the plaintiff.

The jury found that the defendant had not applied to Robinson, and had no communication at all with him, but that he believed the statement made to him by his own coachman. On this finding, the jury, by the direction of the Chief Baron, gave a verdict for the plaintiff, damages 100*l.*

A rule nisi was obtained for a new trial, on the ground of misdirection, and on affidavits (1), which was argued in the Court of Exchequer, in Michaelmas Term, 1867, by *Digby Seymour, Q.C.*, and *Murphy*, for the plaintiff; and by *Ballantine, Serjt.*, and *J. C. Mathew*, for the defendant; and the Court took time to consider.

Jan. 30. The Court being equally divided in opinion, the following judgments were delivered:—

PIGOTT, B. [after stating the facts of the case, proceeded]:—The view taken by the Lord Chief Baron at the trial was, that the defendant was bound to have inquired of Robinson, and to have learned from him whether he had seen the rifle in the plaintiff's possession, before he was justified in causing the arrest, and he so directed the jury, who thereupon found a verdict for the plaintiff. With all respect, I cannot think this view was correct. It may be taken that although a probable cause did exist, yet that is not enough unless the facts which constitute it were also known to the defendant, and were honestly believed by him at the time that he acted upon them, so as to afford a probable cause to him. Now, I think there can be no doubt that a sufficient probable cause in the present case did exist, and that the defendant did believe what he had heard from Hinton. The evidence raised no question upon that point, or it would have been necessary to leave it to the jury. The question then comes to this: was the defendant justified in entertaining a belief of the facts stated to him by Hinton, and in acting on this belief, without further inquiry of Robinson? It seems to me very difficult to see why he should not, and no authority was cited to shew that, as a matter of law, a person is only entitled to entertain and act upon a belief upon the same evidence which would be admissible to prove the same matter in a court of law. I cannot discover any legal principle on which he could be so bound, nor does expediency or the necessity of the case call for any such rule. Why, for instance, should not the defendant be allowed to receive a message or information from one through the medium of another, as if in the present case Robinson had desired Hinton to inform the defendant (his master) that he had seen the plaintiff in possession of the rifle? For if the messenger should prove to be untrustworthy, he who trusted to him would incur responsibility for so doing; but the person charged and arrested would be in no worse position than if the original informer spoke falsely or erroneously. If, again, the defendant had perfect confidence in Hinton's word, while Robinson was a perfect stranger to him, in such case no possible good could come of his asking Robinson the question, whether he had sent such a message or given such information. It is true that in the case supposed there would be an agency created between the original informer and the messenger or medium, but that in my judgment can make no real difference.

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(1) The affidavits were directed to prove that the defendant had in fact communicated with Robinson, before giving the plaintiff into custody, and that Robinson had been mistaken in the statement made by him at the trial, but they were disregarded by the Court, and nothing turned upon them.

Many other suppositions might be made of cases in which a matter might be sufficiently believed upon hearsay, or indirect information, which would fully justify the most prudent mind in acting upon it, and this, I think, is the true test. But if something more than mere hearsay or indirect information of facts constituting a probable cause is required, I think the defendant had such information here. For Robinson charged the plaintiff with having had the rifle in his possession, and he then asserted that he had seen him with it; the defendant is informed of this by Hinton, who was present when the charge was made. It is, therefore, the same as if the defendant had been present at the same interview, and had heard what passed between Robinson and the defendant, for as to that his information is direct and not mere hearsay. It is not material to inquire whether Robinson was charging the plaintiff truly, nor whether the plaintiff denied Robinson's charge; if the charge appeared to be seriously and intentionally made, the defendant, who was interested in the subject matter, would be entitled to act upon it without himself determining its accuracy and truth, if he honestly believed the assertion. I think, therefore, the rule should be made absolute.

BRAMWELL, B. In this case the plaintiff complained of a false imprisonment. The defendant justified on the ground that a felony had been committed, and that he had reasonable and probable cause for giving the plaintiff into custody as the offender. We are not to regard the terms of the plea, but look at the real case.

[After stating the facts of the case, the learned Baron proceeded:]—It is somewhat remarkable that if the plea had charged the plaintiff with the commission of the felony, there would have been good evidence in support of it. This, however, is not the question. The plea is, not that the plaintiff is guilty, but that the defendant had reasonable cause to believe he was so.

Now, two considerations have been prominently presented to us; one in favour of the defendant, the other of the plaintiff. I have in turn thought each decisive, but now think neither is. One was, that facts existed which constituted reasonable and probable cause, that the defendant acted on the belief of the existence of those facts, and that if that belief turned out to be well founded, he was justified. But that cannot be, for by the same reasoning, if the belief turned out to be wrong, then he was not justified, which would be to make his having reasonable and probable cause depend, not on what he believed at the time, but on whether or no Robinson did tell the coachman he had seen the gun in the plaintiff's possession. The argument for the plaintiff was, that a reasonable man before acting on the coachman's information of what he heard from Robinson, would have inquired of Robinson if it was true that he had seen the gun, and satisfied himself that there was no mistake; and that if that was what a reasonable man ought to have done, he ought not to have done differently, and so there was no reasonable cause. But I think on reflection this is a fallacy. It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so. Suppose Robinson, on being asked by the defendant, denied he had seen the gun in the plaintiff's possession, and also that he had so told the coachman, and suppose the defendant had disbelieved him, and thought he was trying to screen the plaintiff, and would tell the truth on his oath, would it necessarily have been wrong in the defendant to act on that belief? I think not. Or, suppose there had been no time to inquire, because the plaintiff was about to leave England? Suppose the informant is perfectly trustworthy as to honesty and accuracy, and repeated the statement of a similarly trustworthy person, known to the defendant so to be, must there be inquiry of the latter? This leads me to my conclusion, viz. that in such cases it is a question of fact for the jury, whether the channels of information were such that the information they conveyed might be reasonably relied on. Consequently I think there was in this case a misdirection, and that there should be a new trial. I am quite aware that reasonable and probable cause is for the judge, but in like manner as it was left to the jury to say whether Robinson told the defendant, as the defendant said he did, so should it have been left to them to say whether the coachman and Robinson were trustworthy persons, that being a pure matter of fact.

KELLY, C.B. [after stating the facts of the case, proceeded]:—That the existence of reasonable and probable cause is a question

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of law for the judge, the jury having ascertained the facts if the facts are in dispute, is now settled law: *Johnstone* v. *Sutton* (1); *Panton* v. *Williams.* (2) But what as matter of law is reasonable and probable cause for giving a man into custody upon a charge of felony, or prosecuting a man for any criminal offence at all, will be found to be a mere question of opinion, depending entirely upon the view which the judge may happen to take of the circumstances of each particular case. And upon a careful and minute consideration of the numerous decisions upon the subject, it seems impossible to deduce any fixed and definite principle to guide or assist the judge in any one case that may come before him. Even if the circumstances of a decided case were apparently identical with those of another case to be determined by a judge, he might be bound to determine the case before him the other way; as one element in all these cases is the credit due to the informant, which may differ in any two cases which may occur. If one of the judges were to tell me that he had been told by another of the judges that he had seen a servant offer for sale a piece of plate that I had lost, I might think it reasonable and probable cause for apprehending the servant for a felony. If the same thing were told me by a fellow-servant of the accused, as having been told to him by another fellow-servant, of whom I knew nothing, or, perhaps, had a bad opinion, I should think that there was no reasonable or probable cause until I had examined the original informant himself, and unless I believed him trustworthy, and had further tested the truth of his information by inquiring at the place at which the article was said to have been offered for sale. I would not, therefore, lay it down as an inflexible rule of law, that in no case can hearsay evidence amount to reasonable and probable cause; but if in any case hearsay evidence can be deemed sufficient, it would be one in which the judge is himself satisfied that the evidence was such as to justify a discreet and reasonable man in preferring a charge of felony. It has certainly been decided in more than one case, that where any one has lost property under circumstances leading to the suspicion that it has been stolen, and he is informed by a credible person, and one whom he believes, that he has seen the property in the possession of the person suspected, he has reasonable

(1) 1 T. R. at p. 545. (2) 2 Q. B. 169.

and probable cause for the charge. But I am not aware that any court or judge has ever gone further, and decided that when the informant speaks to no fact within his own knowledge, but reports only what he has been told by another, who may be, but has not been, questioned by the defendant, such hearsay information, though believed to be true, necessarily amounts to reasonable and probable cause. Tindal, C.J., in *Broad* v. *Ham* (1), held that "in order to justify a defendant there must be a reasonable cause, such as would operate on the mind of a discreet man; there must also be a probable cause, such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge, otherwise there is no probable cause for him." And the whole Court concurred with the Lord Chief Justice. Now, in this case, the defendant swore that he acted on the information not merely of his own coachman, which was hearsay, but of Robinson, who had declared that he had himself seen the gun upon the premises of the plaintiff and his father. But Robinson swore, and the jury found, that he had made no such statement to the defendant, who therefore appeared to have acted upon the hearsay evidence of his coachman alone. I thought upon this, and am still of that opinion, that a reasonable and discreet man would not have charged another with felony upon the mere hearsay statement of his coachman, but was bound to have inquired into the truth and accuracy of his information from Robinson, who lived in the same village as himself, and from whom that information was said to have been obtained. The additional statement of the coachman, that he had accompanied Robinson to the plaintiff's premises, when a gun was produced which Robinson had asserted to be a different gun from that which he had seen before, seemed to me to carry the case no further, being still matter depending only on Robinson, and a mere repetition in another form of what Robinson was supposed to have said as to having seen the gun on the premises of the plaintiff's father. Indeed I thought that this new question raised about the identity of the gun, and still depending upon the credit due to Robinson, rendered it still more clearly incumbent on the defendant to question Robinson himself. And, under all these circumstances, I held that there was an absence of reasonable and probable cause. I agree that we should pronounce no decision which could tend to prevent or impede a firm but honest attempt to obtain justice by one who believes himself to be aggrieved; but on the other hand, I feel that our fellow-subjects are entitled to our protection against the imprisonment of their persons, and the disgrace which necessarily attends a charge of felony, where the accuser has no other ground to act upon than that somebody has told him that he has been told by somebody else of something which may be capable of explanation upon inquiry, though, unexplained, it may be calculated to create suspicion. These considerations weighed with me in the present case, inasmuch as the plaintiff was living openly, and was well known, in the place; there was no suggestion that he was likely to run away, and the defendant had the means of fully and satisfactorily investigating the matter by applying to a magistrate for a summons, and leaving him to put the law in motion as justice might seem to require. I am therefore of opinion, and my Brother Channell agrees with me, that the rule should be discharged.

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(1) 5 Bing. (N. C.) at p. 725.

The Court being equally divided in opinion, Pigott, B. withdrew his judgment, and the rule was discharged.

Rule discharged.

From this decision the defendant appealed.

The defendant's points on appeal were:—

1. That the Chief Baron should have directed the jury that the defendant had shewn that there was reasonable and probable cause for giving the plaintiff into custody.

2. That even if the defendant had been shewn to have acted exclusively on the statements of Hinton, the jury should have been asked whether Hinton's statements might reasonably have been believed.

3. That the evidence shewed that the defendant did not act on mere hearsay, inasmuch as the information given by Hinton from his personal knowledge shewed that Robinson had charged the plaintiff with the possession of the rifle, and that plaintiff had failed to give a satisfactory explanation.

4. That there is no such principle as that suggested in the direction of the learned judge, that the existence of reasonable and probable cause can only be proved by evidence as strict as would be necessary to establish the guilt of the person accused.

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The plaintiff's points were :—

1. That under the circumstances the defendant ought to have made further and more careful inquiries as to the facts.

2. That he ought to have ascertained from Robinson by personal inquiry, whether the statements made by him to Hinton, and by Hinton to the defendant, were true.

3. That the plaintiff being a respectable young man residing in the same village as defendant, and not being likely to abscond, the defendant ought to have investigated the matter more strictly, and that on information based upon mere hearsay evidence he should not have given the plaintiff into custody.

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May 14. *Ballantine, Serjt.* (*J. C. Mathew* with him), for the defendant. It is not disputed that there was ample evidence of a felony having been in fact committed; the only question was, whether the defendant had reasonable cause for giving the plaintiff into custody. And that resolves itself now into the question of whether the Chief Baron's direction was correct in leaving to the jury the single question whether they did or did not believe that the defendant had inquired of Robinson, a mode of directing them which makes the decision of the question as to the existence of reasonable and probable cause depend entirely upon that fact.

[BYLES, J. The ruling appears to raise the question of whether the defendant was entitled to act on hearsay evidence which he believed.

MONTAGUE SMITH, J. That is qualified by the circumstance that if he had gone direct to Robinson, he might have heard the facts he relied on at first hand.

LUSH, J. Three averments are required in the plea; first, that a felony had been committed; second, that there was conduct on the part of the plaintiff leading to a suspicion of him; and third, that this conduct was known to the defendant. But if it was, in fact, known to the defendant, does it matter how he knew it ?]

Not at all; if, in fact, reasonable ground existed: *Davis* v. *Russell.* (1)

[BLACKBURN, J. The question is, was it reasonable to him? What he acted on, according to the finding of the jury, was Hinton's account of what Robinson had said. But suppose the original

(1) 5 Bing. 354.

author of the information were a person of such a character that the ground of belief would not be improved by resorting to him ?]

The matter must depend to some extent on the character and trustworthiness of the person from whom the information is ultimately derived, and also of the person from whom it is immediately derived; and that is a question which ought to have been left to the jury. They might have found that Hinton was a person of such credibility and trustworthiness that the defendant might properly have trusted him. Moreover, Hinton's evidence was more than hearsay, for he was himself present when the plaintiff was challenged with the possession of the gun.

[LUSH, J. The plea states that the ground of the defendant's action, and the information believed by him, was the statement of Robinson. But there was no statement made by Robinson to the defendant, so that the plea was not proved.]

The plea need not be taken to refer to a statement made by Robinson himself to the defendant. But the question here does not turn on the pleadings but on the facts.

[MONTAGUE SMITH, J. We must examine the pleadings, however, because the direction of the Chief Baron was given with reference to them.

KEATING, J. The defendant himself says that he did not act on the information of Hinton.]

To uphold the ruling, the Court must in substance decide that it is not competent to a person to act on evidence that would be insufficient to prove the plaintiff guilty on his trial for felony.

[BLACKBURN, J. There may be a difference according to the circumstances. A man might be justified in immediately arresting a person of whom he knew nothing, and who was in the act of quitting the neighbourhood, when he would not be justified if the person were resident there, and known to him.]

Digby Seymour, Q.C. (*Murphy* with him), for the plaintiff. The substance of the definition of reasonable and probable cause given by Tindal, C.J., in *Broad* v. *Ham* (1) is, that there must be such a state of circumstances, known to the defendant, as would produce in the mind of a reasonable man a belief in the guilt of the plaintiff sufficiently strong to justify him morally, and according to the

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(1) 5 Bing. N. C. at p. 725.

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ordinary rules of human conduct, in doing as he has done. This must depend upon the circumstances of the case, and will vary with the acts done, for that might be sufficient to justify the application for a search warrant, which would not justify the giving in custody. Now here all parties were at hand, and inquiry was easy; but the defendant has chosen to content himself with hearsay evidence, and if this is to be allowed as founding reasonable and probable cause, at what point will it be possible to stop? If hearsay in the first degree is allowed, and A. may act on what B. has told him he heard from C., why may he not act on what B. has told him he heard through C. from D., and so on through all the letters of the alphabet?

[MONTAGUE SMITH, J. The statement made by the defendant as to the step he took in inquiring of Robinson shews what he thought to be the proper course to pursue. The judge at the trial is in a much better position than we are for estimating what was probable cause under the circumstances; and though we cannot decline to review his decision, we ought to be able to see very clearly that he was wrong before we reverse it.]

Ballantine, Serjt., in reply.

The judgment of the Court (Byles, Blackburn, Keating, Montague Smith, and Lush, JJ.) was delivered by

4 HL 5[illegible]

BYLES, J. Where there is a ready and obvious mode of ascertaining the truth, and the opportunity of so doing is neglected by the defendant in such an action as the present, we think the absence of inquiry is an element in determining the difficult question of the presence or absence of reasonable and probable cause. What its weight may be must depend on the circumstances of each particular case, but we cannot decide that in the case before us the Lord Chief Baron was wrong in saying that the failure to obtain information from Robinson would prevent the existence of reasonable and probable cause.

Judgment affirmed.

Attorney for plaintiff: *W. Gardiner.*
Attorney for defendant: *E. C. Seaman.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXI VICTORIA.

GWYN *v.* THE NEATH CANAL NAVIGATION COMPANY.

1868
May 23.

Deed—Instrument—Construction—Estoppel.

In 1801, by a deed since lost, after reciting the conveyance to the defendants by Lord Vernon, by a deed poll of even date, of the site of a canal and other premises, in consideration of an annual rent of 105*l.*, to be paid to him "or the person or persons to whom the freehold or inheritance of the premises thereby released should for the time being belong, in case the said instrument or deed poll had not been made;" the defendants covenanted with Lord Vernon, "and to and with the said person or persons to whom the freehold or inheritance of the hereditaments and premises hereinbefore recited to be released *shall for the time being belong*," to pay the said yearly rent-charge in manner as and at the times whereon the same shall become due and payable; and a power to distrain for non-payment of the rent-charge was given, and covenants made by the defendants, to and with persons described, in the same terms as the grantees of the rent-charge.

In 1827, by a deed poll reciting the last deed verbatim, and the fact of its loss, and reciting the death of Lord Vernon, and that the "freehold and inheritance of the hereditaments and premises mentioned and comprised in the said deed poll, *or the said rent-charge or yearly sum of* 105*l.*," was then vested in the Earl of Jersey, and that the rent-charge had been duly paid to Lord Vernon during his life, and to the Earl of Jersey since his death; the defendants ratified and confirmed the deed poll so executed as aforesaid, and declared that the same should be "good, valid, and effectual, to all intents and purposes, according to the true intent and meaning thereof, notwithstanding the same is lost or mislaid as aforesaid." In an action by the assignee of the rent-charge :—

Held, that the terms of the deed of 1801 were explained by the recital contained therein and the recitals of the deed of 1827, and that the latter deed, admitting under the defendants' seal that the rent-charge was then vested in fee in the Earl of Jersey, estopped the defendants from denying it, and formed good evidence of a valid grant.

DECLARATION, that a deed poll, which has been, and still is, lost by accident, was executed by the defendants, whereby, after reciting that Lord Vernon by a deed, bearing even date with the said deed poll, in consideration of the annual rent of 105*l.*, to be from thenceforth yielded and paid to him [or the person or persons to whom the premises thereby released should for the time being belong, in case the said deed had not been made], by two half-yearly payments by the said company, did thereby and in pursuance of, &c., release and convey to the said company a canal, &c.; the said company, by virtue, &c., and for the considerations in the said deed mentioned, did for themselves and their successors covenant with the said Lord Vernon [and to and with the person or persons to whom the freehold or inheritance of the hereditaments and premises thereinbefore recited to be released should for the time being belong], that they, the said company, and their successors, should and would from time to time and at all times thereafter pay or cause to be paid the said yearly rent or sum of 105*l.*, in manner as and at the times whereon the same should become payable; the declaration then alleged that after the making of the deed all the interest of Lord Vernon under the said deed poll, and in the said yearly rent, became and was and is vested in the plaintiff, and he became the person to whom the said freehold or inheritance of the said hereditaments and premises [belonged]; and alleged that the rent was in arrear.

Pleas: 1. Non est factum. 2. That the interest of Lord Vernon under the deed and in the said yearly rent did not become vested in the plaintiff, nor did he become the person to whom the said freehold and inheritance of the said hereditaments and premises belonged, as alleged in the declaration. Issue thereon.

At the trial of the cause before Pigott, B., at the Glamorganshire spring assizes, 1868, the plaintiff gave in evidence a deed poll executed by the company, and dated the 5th of July, 1827,

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which recited, apparently verbatim, an earlier deed poll of the defendants, dated the 29th of September, 1801.

The deed poll of the 29th of September, 1801, as recited, was in the following words:—"Whereas the Right Hon. George Venables Vernon, Lord Vernon, Baron of Kinderton, in the county of Chester, by a certain instrument or deed poll under his hand and seal, bearing even date with these presents, in consideration of the annual rent of 105*l.* of lawful money of Great Britain, to be from thenceforth yielded and paid unto him, *or the person or persons to whom the freehold or inheritance of the premises thereby released should for the time being belong, in case the said instrument or deed poll had not been made*, by two half-yearly payments, by the said company of proprietors, did thereby, in pursuance of or by force and virtue of the powers in that behalf contained in the above recited act (31 Geo. 3, c. 85), grant, bargain, release, and convey unto the said company of proprietors [a canal and certain other premises], to hold unto and to the use of the said company of proprietors and their successors for ever, according to the true intent and meaning of the said act, or an act of 38 Geo. 3, c. xxx., for amending the first-mentioned act, and extending the said canal; as in and by the said recited instrument or deed poll, relation being thereunto had, will appear. Now these presents witness, that by virtue of the said recited acts of 31 Geo. 3, c. 85, and 38 Geo. 3, c. xxx., and for the considerations in the said recited instrument or deed poll mentioned, the said company of proprietors of the said Neath Canal Navigation, do hereby, for themselves and their successors, covenant, promise, and agree to and with the said Lord Vernon, and to and with the said *person or persons to whom the freehold or inheritance of the hereditaments and premises hereinbefore recited to be released shall for the time being belong*, by these presents in manner following (that is to say), that they, the said company of proprietors and their successors, shall and will, from time to time and at all times for ever hereafter, well and truly pay, or cause to be paid, the said yearly rent or sum of 105*l.*, in and by the said hereinbefore recited instrument or deed poll reserved, in manner as and at the times whereon the same shall become due and payable." Covenant by the defendants to pay rates, &c., and to indemnify "the said Lord Vernon, and the person and persons to

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whom the freehold or inheritance of the said hereditaments and premises hereinbefore recited to be released *shall for the time being belong*." Powers of distress for non-payment of rent were given by the defendants to persons described in the same terms; and the defendants covenanted with the same persons to erect a wharf wall at the end of the canal.

After this recital, the deed of 1827 proceeded :—"And whereas the said George Venables, Lord Vernon, hath departed this life since the date and execution of the said deed poll, and the freehold or inheritance of the hereditaments and premises mentioned and comprised in the said deed poll, *or the said rent-charge or yearly sum of* 105*l*., is now vested in the Right Hon. George Earl of Jersey; and whereas the rent or sum of 105*l*., secured by the said deed poll, hath been duly paid to the said Lord Vernon during his life, and to the said Earl of Jersey since his death, up to the 25th of March, 1827; and whereas the said deed poll hath been lost or mislaid, and the said George Earl of Jersey hath applied to and requested the said company of proprietors to confirm the said deed poll in manner hereinafter mentioned, to which the said company have agreed. Now these presents witness, that in pursuance of the said agreement and for the consideration aforesaid, the said company of proprietors have ratified and confirmed, and by these presents do ratify and confirm the said deed poll so executed as aforesaid, and do declare that the same shall be good, valid, and effectual to all intents and purposes, according to the true intent and meaning thereof, notwithstanding the same is so lost or mislaid as aforesaid. In witness, &c."

The plaintiff also proved a conveyance to him by Earl Jersey and his trustees, by lease and release, dated the 23rd and 24th of June, 1828, of certain lands, and of "all that yearly rent-charge or sum of 105*l*. charged upon the Neath canal and lands in the county of Glamorgan, granted by the company of proprietors of the Neath canal navigation to the late Lord Vernon."

The counsel for the defendants then objected that the declaration was repugnant and absurd, since it stated a rent-charge payable by the defendants to themselves; and he claimed a nonsuit. The learned judge refused to nonsuit the plaintiff, and directed a verdict to be entered for him, giving the defendants leave to move to enter the verdict for them, the plaintiff to be at liberty to make any amendment that could enable him to recover on the evidence given, and the defendants to be at liberty to amend their pleas if necessary.

Two forms of amendment were subsequently proposed, both of which were before the Court on the argument of the rule. The first substituted for the words included in the first bracket in the declaration the words "and his assigns of the said rent, *or* the person or persons for the time being entitled to the said rent," and for the words in the second bracket the same words, substituting *and* for *or*. The second substituted for the words "should for the time being belong" in the second bracket, and for "belonged" in the third bracket, the words "would for the time being have belonged, in case the said deed had not been made," these being the words of the recital.

A rule having been obtained pursuant to the leave reserved,

Giffard, Q.C., and *H. G. Allen*, shewed cause. If from the whole of an instrument taken together the intention of the parties is clear, the defect, redundancy, or error of one part will be supplied, restrained, or corrected by the residue. It is clear, upon the deed of 1801 as recited, that the grant of the rent-charge is intended to be perpetual, and to pass on the death of Lord Vernon to others in succession. These persons are described in the recital of the deed of even date, and in the statement of the consideration of that deed; and the expressions there used are either equivalent to heirs and assigns, or else signify that the rent-charge is to go with the property from which the land conveyed to the company was detached. In the latter case, whatever that property was, the defendants have admitted under their seal, and are estopped from denying that it was, in 1827, vested in Earl Jersey in fee. If so, the rent-charge was similarly vested, and it is so recited; and as it has now been conveyed to the plaintiff, the plaintiff is in the same position as Earl Jersey was at that time. But if the words be taken more simply, as being equivalent to heirs and assigns, then it is merely admitted by the defendants that that rent-charge was vested in Earl Jersey in fee, and the words in the deed of 1827, "hereditaments and premises . . . *or* the said rent-charge,"

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are equivalent expressions. In any view, therefore, the plaintiff is entitled. In *Payler* v. *Homersham* (1), and in *Simons* v. *Johnson* (2), the operative words of deeds were restrained by the recitals; and in *Lord Say and Seal's Case* (3) the names of the parties to an indenture, in *Flight* v. *Lake* (4) essential words in an annuity memorial, and in *Langston* v. *Langston* (5) a limitation of an estate tail were supplied. The principles applicable to the case were laid down and applied in *Smith* v. *Packhurst* (6); see also per Copley, Serjt., arguendo in *Cholmondeley* v. *Clinton.* (7)

Bowen and *Hughes* supported the rule. The change in the language of the deed required to support the plaintiff's demand far exceeds what has been done in any of the cases cited, and is such as can only be effected by an application to equity to reform the instrument. The same form of expression is repeated four times in the deed of 1801, a circumstance favouring the theory that it is designed and intentional. But if not designed, still the words cannot be struck out and others substituted, the more so as it cannot be clearly shewn what the substitution ought to be, and the alteration would be merely conjectural. The decision in *Cholmondeley* v. *Clinton* (8) is in favour of the defendants, and this agrees with several cases where the Courts have refused to alter or supply mistakes and deficiencies. The Court refused in *Holden* v. *Raphael* (9) to supply the name of the debtor in a bail bond, and in *Doe* v. *Godwin* (10) to read "hereinafter" as "herein." That by reading the operative words as they stand the deed becomes insensible is no sufficient argument for reading them otherwise, as is shewn by *Doe* v. *Carew* (11), where a proviso in a lease for re-entry, which was insensible, was not amended. They also cited *Allan* v. *Mawson* (12); *Palmer* v. *Staveley.* (13) With respect to the estoppel, it has not that certainty which is required; the terms of the recital itself are ambiguous: note to *Doe* v. *Oliver*, 2 Smith L.C. 6th ed., pp. 671, 693.

(1) 4 M. & S. 423.
(2) 3 B. & Ad. 175.
(3) 10 Mod. 41, 46; 4 Bro. P. C. 73.
(4) 2 Bing. N. C. 72.
(5) 2 Cl. & F. 194.
(6) 3 Atk. 135.
(7) 2 B. & A. at p. 637
(8) 2 B. & A. 625.
(9) 4 A. & E. 228.
(10) 4 M. & S. 265.
(11) 2 Q. B. 317.
(12) 4 Camp. 115.
(13) 1 Salk. 24.

KELLY, C.B. [after stating the facts, proceeded]:—The question for us is, whether from the obscure and doubtful terms of the deed of 1801, as they are recited in the deed of 1827, we can collect enough to satisfy us that the plaintiff, claiming under Lord Jersey, is entitled to maintain an action for this rent-charge; and that question we must determine as a court of law, administering the rules of law. The result of all the authorities is, that when a court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned. I have had some doubt whether it was competent to us so to deal with this deed as to establish the plaintiff's title, or whether it would not be necessary to resort to equity. But when a court of equity is called upon to reform an instrument, and to make it conformable to the intentions of the parties, it must be under such circumstances as would preclude a court of law from giving effect to that intention, by reason of the inadmissibility of extrinsic evidence to explain it. On the other hand, it is only when it is impossible upon the face of the deed to collect the true intention, or when something appears shewing that it does not truly express that intention, that extrinsic evidence can be resorted to by a court of equity to supply or correct that deficiency. Now, on looking at this deed, it is unnecessary to resort to such evidence, for from the language of the deed itself as recited, the full intention of the parties in relation to this rent-charge may be satisfactorily and clearly discovered. The deed of 1801 recites a conveyance by Lord Vernon to the defendants of the site of a canal and some other premises, in consideration of an annual rent of 105*l.* to Lord Vernon, "or the person or persons to whom the freehold or inheritance of the premises thereby released should for the time being belong in case the said instrument or deed poll had not been made"; that is, in consideration of a rent-charge to Lord Vernon without words of inheritance, and therefore only for life, and after his death to the persons who would have been the owners of the land in case the deed of conveyance had not been made. Then follow the operative words, which purport to grant the rent-charge to Lord Vernon and to those to whom the land will belong, and the power of distress is given in the same terms. Now what construction are we to put on this? It is clear and certain that a perpetual rent-charge was intended to be granted. To whom, then, was it intended that it should be granted? It would be repugnant and insensible that a grant to the company themselves should be meant, since they were themselves the makers of the grant. In the first instance, it is granted to Lord Vernon for life, and the intention is equally clear that it should pass on his death to those to whom the site released would have belonged. To whom, then, would the site have belonged? If the deed rested there the difficulty might, perhaps, have been insuperable. But when we go on with the deed in which this deed of grant is recited, we find what puts an end to all difficulty, and shews clearly and distinctly under the seal of the company, that the "freehold or inheritance of the hereditaments and premises mentioned and comprised in the said deed poll or the said rent-charge or yearly sum of 105*l*.," was then vested in the Earl of Jersey. Now that cannot mean that the site of the canal had vested in the Earl of Jersey; and the company have therefore contradicted that construction of the words describing the class to whom the rent-charge was to pass, which would make them apply to those who were owners of the site conveyed. But it is clear that the framer of the instrument felt a difficulty in describing the present interest of the Earl of Jersey, so as to make it correspond with the words of limitation contained in the original deed, and therefore after repeating the words used in the deed, or words nearly corresponding to them, he adds the words, "or the said rent-charge or yearly sum of 105*l*." So that no doubt whatever is left that the inheritance of the rent-charge which had been granted by the deed to Lord Vernon for life, had after his death vested in the Earl of Jersey, and was by the company confirmed to him by this deed. We may very probably infer that the land granted formed part of a much larger estate, of which Lord Vernon was the tenant for life under a settlement by deed or will, and of which the Earl of Jersey afterwards took the fee simple as remainder man; and that the rent-charge was for that reason granted to him for life only, and in remainder to those who were entitled in remainder under the settlement; so that the words of the operative part of the deed would obviously point to the same persons as are described in the introductory clause. But the admission in the subsequent deed makes it unnecessary for us to resort to any such conjecture. And it is satisfactory to know that we are able to effect the justice of the case, without violating or transgressing any rule of law.

MARTIN, B. I am of the same opinion; but I am not at all insensible to the difficulties of the case. The question is, whether on the evidence given at the trial, the jury could properly have come to the conclusion that the plaintiff was entitled to the rent-charge. It is rather a question of fact than of law, but that question is submitted to us for decision. Beyond the deed of 1827, the only evidence is, that whatever was vested in the Earl of Jersey has been conveyed to the plaintiff, so that if no such conveyance had been made, and the Earl of Jersey's heir had sued, he would have been in precisely the same position as the present plaintiff. Now, in such an action, this deed under the defendants' seal would be the strongest possible evidence against them. Although it recites the deed of grant, it does not profess to state precisely the terms in which it was executed, and we have therefore a right to see what conclusion is to be drawn from the whole deed of 1827. The deed first recites a conveyance of land by Lord Vernon to the company, in consideration of the rent-charge to be paid to Lord Vernon, "or to the persons to whom the freehold or inheritance of the premises thereby released should for the time being belong, in case the said instrument or deed poll had not been made." We have no private Act of Parliament before us, but we may very fairly conclude that Lord Vernon was only tenant for life, and that he was enabled by virtue of statutory powers to convey the land and bind the remainder man. The deed then goes on to grant the rent-charge, and it amply appears that in this part of the deed there is a mistake, and in all probability a miscopy; because the rent-charge is made payable to the persons to whom the premises so released would belong, and the same mistake is repeated in other parts of the deed. This is in itself insensible, and is inconsistent and repugnant to the real intention of the parties, as shewn by the recital. But the rent-charge is to be paid "at all times for ever hereafter," so that it is clear it is intended to be a perpetual rent-charge. The deed of 1827 then recites that the rent-charge was then vested in the Earl of Jersey, and the mode in which this is stated is not so incorrect as it might appear, for with respect to the site of the canal, at least, the grant of it may have been thought a grant of a mere incorporeal hereditament, viz., the right of making a canal, and the rent-charge would in that case be rightly reserved. The deed then recites the payment of the rent-charge, and the death of Lord Vernon, and that the rent-charge is now vested in the Earl of Jersey. These circumstances entitle the Court to draw any inference that is necessary to support the right recited to exist in the Earl of Jersey, and which, if it so existed, is now vested in the plaintiff.

BRAMWELL, B., concurred.

CHANNELL, B. I am of the same opinion, and I have never entertained much doubt as to any of the points argued; but, considering the importance of the question, I think it right to add my reasons. By the choice of the learned counsel, no question was left to the jury, and the whole matter is referred to us for decision. The declaration at first claimed a rent-charge in the terms of the recital of the deed of 1801, alleging matter of fact to shew the plaintiff entitled. The defendants pleaded non est factum, and although they could not succeed upon that plea, yet their further plea denying the title of the plaintiff compelled him to prove his title as alleged, which according to the terms of the declaration he could not do. The plaintiff has now amended his declaration, by stating what he asserts to be the legal effect of the deed, and now the defendants' plea of non est factum applies, and raises the question whether the legal effect of the deed is correctly set out. I am of opinion that the deed does correspond with the legal effect stated in the declaration; nor do I feel any difficulty in so construing it. The rule of law is, that you are to construe a deed so as to make every part consistent; and the class of cases in which a court of equity must be applied to are those where the language of the deed admits of only one construction, and that not the construction which the parties intended. It is therefore within the power

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of this Court to see what is the meaning of the covenant. Now, though the words used might by themselves be capable of a different meaning, we may call in aid the recitals to explain them, especially that recital which states the whole interest to be then vested in the Earl of Jersey. The right course then is, not to reform or correct the instrument, but to construe it by the light of the recitals. It is impossible not to see that there is a strong probability that Lord Vernon was not seised in fee of the property conveyed, for if he had been, the purchase money would probably have been payable at once, or if a rent-charge had been created, it would have been granted to Lord Vernon, his heirs and assigns. But by the deed he is made to convey the fee simple and inheritance of the land, and if, being unable of himself to make such a conveyance, he has been enabled by the legislature to do so, we have a reason why he may have been compelled to reserve a rent-charge for the interest of those in remainder. Now, suppose in 1828, the year after the deed of confirmation, the Earl of Jersey had himself sued the defendants for the rent-charge, and had put in evidence this deed, who can say that it would not have been very cogent evidence of his title, being an admission under the defendants' seal; and if the question had been left to the jury, there would have been abundant evidence to shew his right in the manner here set out and declared upon. But there is no reason, if the Earl of Jersey could have proved his title, why the plaintiff, who claims under the Earl of Jersey, should not equally succeed. On all grounds, therefore, I am of opinion that the plaintiff is entitled to have this rule discharged.

Rule discharged.

Attorneys for plaintiff: *Vizard & Co.*
Attorneys for defendants: *Wrentmore & Son.*

1868
June 3.

SCOTT *v.* STANSFIELD.

Slander—County Court Judge—Words spoken by, while sitting in capacity of Judge—Malice—Irrelevance.

5 QB 98, 115
PC 501
8 QB 262.
7 HL 747
1 CPD. 541
544
1 ExD. 380
2 CPD. 54
11 QBD 591
5 Q7, 603.

Plea, to a declaration for slander, that the defendant was a county court judge, and the words complained of were spoken by him in his capacity as such judge, while sitting in his court, and trying a cause in which the present plaintiff was defendant. Replication, that the said words were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not bonâ fide in the discharge of the defendant's duty as judge, and were wholly irrelevant in reference to the matter before him:—

Held, that the replication was bad, and the action not maintainable.

Declaration, for that the plaintiff carried on the business of an accountant and scrivener, and the defendant falsely and maliciously, and without reasonable or justifiable cause, and not on any justifiable occasion, spoke and published of the plaintiff, of and concerning him in relation to his said business and the carrying on and conducting thereof, the words following, that is to say: "You," meaning the plaintiff, "are a harpy, preying on the vitals of the poor."

2nd plea: that before and at the time when the alleged grievance was committed, the defendant was the judge of a certain court of record, being the County Court of Yorkshire, holden at Huddersfield, and at the time when he did what was complained of, the defendant was sitting in the said court, and acting in his capacity as such judge as aforesaid, and was as such judge hearing and trying a cause in which the now plaintiff was defendant, the hearing and determination of which was within the jurisdiction of the said court; and during the said trial the now defendant, in his capacity as such judge, did, as such judge sitting as aforesaid, speak and publish the said words of which the plaintiff complains, which is the supposed grievance above complained of.

Replication to the 2nd plea: that the said words so spoken and published by the defendant as aforesaid, were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not bonâ fide in discharge of his duty as judge as aforesaid, and were wholly uncalled for, immaterial, irrelevant, and impertinent, in reference to, or in respect of, the matters before him, and were wholly unwarranted on the said occasion, of all which premises the defendant had notice before and at the time of the committing of the said grievance, and then well knew.

Demurrer and joinder.

Quain, Q.C. (*Kemplay* with him), in support of the demurrer. The plea and replication taken together raise the question whether the defendant is liable to an action in respect of the words mentioned in the declaration, such words having been spoken by him in his capacity of judge, but spoken falsely, maliciously and irrelevantly. There is no authority for the position that an action will lie against a judge for anything done by him while acting in the exercise of his jurisdiction. The remedy for any official misconduct on the part of the defendant is by application to the Lord Chancellor for his removal. The principle which governs these cases is laid down in the case of *Floyd* v. *Barker*. (1) That principle has been followed in a long series of decisions, see *R.* v. *Skinner* (2); *Miller* v. *Hope* (3); *Jekyll* v. *Sir John Moore* (4); *Revis* v. *Smith* (5); *Henderson* v. *Broomhead* (6); *Fray* v. *Blackburn*. (7) It is quite clear from these cases that no action will lie against a judge for a judicial act, though it be alleged to have been done maliciously and corruptly. The true ground of a judge's exemption from actions is to be found, with a review of the older authorities, in the judgment of Chief Justice Kent, in the case of *Yates* v. *Lansing*. (8) In the case of *Thomas* v. *Churton* (9) it was held, that a coroner holding an inquest is not liable to an action for words falsely and maliciously spoken by him in his address to the jury; but Cockburn, C.J., there said (10): "I am reluctant to decide, and will not do so until the question comes before me that if a judge abuses his judicial office by using slanderous words, maliciously and without reasonable and probable cause, he is not to be liable to an action." The present replication is probably founded upon that dictum.

(1) 12 Rep. 23.
(2) Lofft, 55.
(3) 2 Shaw, Sc. App. Cases, 125.
(4) 2 B. & P. (N. R.) 341.
(5) 18 C. B. 126. 2 Jur NS 614
(6) 4 H. & N. 569. 5 Jur NS 1175
(7) 3 B. & S. 576.
(8) 5 Joh. 282; 9 Joh. 395.
(9) 2 B. & S. 475. 8 Jur NS 795
(10) 2 B. & S. at p. 479. 8 Jur NS 795

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Manisty, Q.C., contrà. The decisions cited are inapplicable to the present case. For it was not alleged in any of those cases, that the judge had said, maliciously and without reasonable cause, what was altogether irrelevant to the matter before him. In Addison on Torts, 2nd ed., p. 547, the law is thus laid down: "A judge, therefore, is not answerable for slander spoken by him in the exercise of his judicial functions in reference to a matter before him; but, if he goes out of his way to make slanderous attacks on the character of private persons in respect of matters not before him, and into which he has no jurisdiction to inquire, he will be responsible, like any other individual, for the consequences." The cases cited in support of that proposition are *Lewis* v. *Levi* (1), and *MacGregor* v. *Thwaites* (2); but, it must be admitted, they do not go far enough to support the plaintiff's contention. It is, however, clear, that the fact of a judge's having jurisdiction to try a particular case will not justify his going out of his way, and, with reference to a subject wholly irrelevant, making falsely and maliciously slanderous statements affecting private character. It is then just as if he were not acting in his judicial character at all. He cannot abuse his office for the purpose of doing with impunity, under colour of it, that which has no connection with it and which in a private individual would be actionable. In the case of *Houlden* v. *Smith* (3), it was held, that a judge of a county court is answerable for an act done by his command, when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends.

KELLY, C.B. I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge in the court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the bona fides of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

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(1) 27 L. J. (Q.B.) 282.
El. Bl. & El. 537; 4 Jur. N.S. 970

(2) 3 B. & C. 24.

(3) 14 Q. B. 841.

Martin, B. I am also of the same opinion. It seems to me quite clear that words spoken under the circumstances stated in these pleadings are not the subject of an action of slander. The plea states that the defendant at the time when he spoke the words complained of, was sitting as the judge of a court of record, and spoke them while acting in his capacity of judge, and trying a cause within his jurisdiction in which the present plaintiff was defendant. If words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no judge, as my Lord has pointed out, would then be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and maliciously, and not bonâ fide in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented upon to a jury, and the propriety of it determined by them? It appears to me that the opinion expressed by Chief Justice Kent, in the American case cited, puts this matter upon its proper foundation, and states that which is both sound law and good sense in reference to it. I do not think we are really deciding anything new, for to my mind the decisions of the Court of Queen's Bench have gone the full length of our present decision.

Bramwell, B. I am entirely of the same opinion. I will only quote a remark made by the late Lord Chief Baron in the case of *Gelen* v. *Hall.* (1) He there says: " The question is not whether a magistrate who, without any evidence, wilfully and maliciously convicts a person brought before him, is liable to an action, but whether a man who has really acted as a judge shall have the question tried before a jury." There might, first of all, be a question as to what the words uttered really were, for the defendant might get into the box and deny having used the words imputed to him, and the jury might find against him: then it would be a question whether they were spoken bonâ fide. That question also would have to be determined by a jury if such an action as the present were maintainable. I think there would be manifest inconvenience in such a state of things.

Channell, B. I am of the same opinion. If the facts alleged by the replication were true, no doubt there would be misconduct on the part of the defendant. It does not follow from the decision which we now pronounce, that a county court judge can so misconduct himself with impunity. If a county court judge be guilty of misconduct in the exercise of his office, the Lord Chancellor may, if he think it expedient, remove him from such office, but no action will, in my opinion, lie against him for anything done by him in his judicial capacity. For the benefit of the public and the due administration of justice, the law provides that a judge is to be so far free and unfettered in the exercise of his office as not to be liable to an action for what he does in the capacity of judge, and so placed under restraint in the discharge of his duty.

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(1) 2 H. & N. at p. 393.

Judgment for the defendant.

Attorney for plaintiff: *T. Thackery Calvert.*
Attorney for defendant: *H. B. Clarke.*

BIRD *v.* ELWES.

May 27.

Landlord and Tenant—Agreement to Repair—Agreement to pay Charges—Nuisances Removal Act, 1855 (18 & 19 *Vict* c. 121), s. 19.

By an agreement of demise of a house and grounds, the landlord undertook to keep the premises in repair, and to pay all rates, taxes, and charges which might be payable in respect of the premises. In the grounds was a piece of ornamental water, in which during the tenancy an accumulation of mud caused at one spot a public nuisance, and at another spot a nuisance to the tenant, and elsewhere choked up the stream. The tenant, being summoned under the Nuisances Removal Act, 1855, in respect of the public nuisance, employed a contractor to clear out the whole stream to the satisfaction of the inspector of nuisances. Afterwards, at the hearing of the summons, an order was made on him to abate the public nuisance. The whole of the mud was cleared out under the contract, that part which constituted the public nuisance being removed partly before and partly after the date of the order:—

Held, first, that the landlord was not, under his agreement to repair, bound to cleanse the ornamental water.

Secondly, that no charge on the premises in respect of any part of the work done had been created by the proceedings under the Nuisances Removal Act, 1855.

SPECIAL case.

On the 3rd of March, 1862, the defendant, by an agreement in writing, let to the plaintiff a house (called Stoke College) and premises for a term of three years; the tenant agreeing to keep the gardens stocked and cropped, and to keep clear the roofs and gutters, not to alter the arrangement of the grounds, nor to cut or remove the timber, shrubs, or fences, except necessary prunings, not to mow the grass land twice in the year, and to keep down the rabbits; and the landlord agreeing to keep the "house and premises and the waterpipes and pumps in good and substantial repair, and to pay and discharge all rates, taxes, and other charges payable in respect of the premises during the tenancy;" with power to the tenant on or before the 29th of September, 1864, to give notice to continue the tenancy for two years, and with a similar power, in the event of his exercising this option, to give notice on or before the 29th of September, 1866, to continue the tenancy for a further term of two years. In 1864 the plaintiff exercised his option of continuing the tenancy.

In the grounds was a stream of ornamental water, in which, in 1866, an accumulation of mud had taken place, causing a nuisance in two places, one opposite certain cottages, the other adjacent to an island, and in other parts choking up the stream.

On the 24th of August the inspector of nuisances gave notice to the guardians for the Risbridge Union (being under 23 & 24 Vict. c. 77, s. 2, the local authority for the execution of the Nuisances Removal Act), of the existence of a nuisance on the plaintiff's premises at the spot opposite the cottages. The inspector, on the 24th of August, by the direction of the guardians, gave notice to the plaintiff that if the nuisance were not abated within twenty-four hours, a summons would be issued against him; and on the 7th of September, the nuisance not being removed, the guardians directed the inspector to take proceedings against the "occupier" of the premises. On the 10th of September, the inspector laid before the justices an information of the existence of a nuisance at the spot in question, stating it to be "caused by the act or default of the occupier of the premises;" and a summons was thereupon issued by the justices directed to "the occupier of Stoke College," to answer the complaint.

On the 18th of September the plaintiff entered into a contract with one Dyson, to clear out the mud from the whole of the ornamental water, to the satisfaction of the inspector, for the sum of

100*l.* On the 22nd of September he gave notice to continue his tenancy.

Some correspondence had passed between the plaintiff and the defendant in April, the defendant declining to clear out the whole of the ornamental water, as required by the plaintiff, at his own expense; and in September the proceedings before the magistrates were communicated by the plaintiff to the defendant, and the defendant offered to remove the nuisance, but again refused to clear out the whole stream, and on hearing of the plaintiff's contract with Dyson, declined to have anything more to do with the matter.

The mud was cleared out by Dyson according to his contract, the work being commenced on the 19th of September and finished on the 24th of October; and the part of the work done before the 24th of September was a partial removal, at the cost of 13*l.* 13*s.*, of the mud at the spot where the nuisance existed which was the subject of the information.

On the 24th of September the plaintiff appeared to the summons, and the justices made an order, finding the facts in the terms of the information, and ordering the "occupier" within twenty-five days to remove the nuisance, and in default authorizing the guardians to enter and do all things necessary for carrying out the order.

The plaintiff paid the 100*l.* to Dyson, and 5*l.* to the inspector for superintending the work, and these charges were reasonable. The cost of removing the nuisance referred to in the order was 21*l.*, including the 13*l.* 13*s.* attributable to the work done before the 24th of September, leaving 7*l.* 7*s.* as the cost of doing the rest of the work included in the order; and the cost of removing the nuisance adjacent to the island was 16*l.* The plaintiff sought to recover the whole of the money paid, and the question for the opinion of the Court was, whether the plaintiff was entitled to recover from the defendant the said sums of 100*l.* and 5*l.*, or any and what part of the said sums?

The pleadings were made part of the case. The first count of the declaration set out the agreement of demise, and the notices of renewal, and averred that certain taxes and charges, amounting to 105*l.*, became payable in respect of the premises during the tenancies, which, by the agreement, the defendant was bound to pay; and that the defendant did not pay the same, whereby the plaintiff had been obliged to pay and discharge the same; the second count stated the same matter in substance, without setting out the agreement or notices of renewal; the third count was for money paid, and for work, services, and materials. The pleas to the first and second counts were traverses of the agreement, of the notices, of the tenancy, and of the averments that the taxes and charges became payable, and that the plaintiff did not pay them; and to the third count, never indebted. Issue.

The Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 12, empowers justices, on complaint by the local authority, to issue a summons to the person by whose act, default, permission, or sufferance, the nuisance arises or continues, or if such person cannot be found, the owner or occupier of the premises in which the nuisance arises, and if, on inquiry, the existence of the nuisance is proved, to make an order on such person, owner, or occupier, for the abatement of the nuisance.

By s. 14, penalties are imposed on any person not obeying the order for abatement; and it is provided that "the local authority may, under the powers of entry given by the act (s. 11), enter the premises to which the order relates, and remove or abate the nuisance condemned or prohibited, and do whatever may be necessary in execution of such order, and charge the cost to the person on whom the order is made, as hereinafter provided."

By s. 19, the reasonable costs and expenses of making a complaint, obtaining an order, or carrying the same into effect under the act, "shall be deemed to be money paid for the use and at the request of the person on whom the order is made . . . . and in case of nuisances caused by the act or default of the owner of premises, the said premises shall be and continue chargeable with such costs and expenses, and also with the amount of any penalties incurred under this act."

By the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 34, the nuisance authority (which by s. 15 means any authority empowered to execute the Nuisances Removal Acts) may at their discretion require the payment of any costs or expenses which the owner of any premises may be liable to pay under the Nuisances Removal

Act or this act, either from the owner or from any person then or at any time thereafter occupying the premises, and the owner or occupier shall be liable to pay the same, and the owner shall allow the occupier to deduct the sum so paid from the rent; provided that nothing in the act contained shall affect any contract between the owner and occupier by which it is agreed that the occupier shall pay or discharge all rates dues and sums of money payable in respect of the premises, or affect any contract between landlord and tenant.

Thesiger (*Denman, Q.C.*, with him), for the plaintiff. The agreement to repair must be construed according to the subject of demise, and must extend to the whole of it: *Barrett* v. *Duke of Bedford.* (1) It must include, therefore, such repair as is appropriate to a piece of ornamental water, that is, such repair as will keep it in the condition of being ornamental water. And this must include cleansing and scouring it, otherwise the absurdity would follow that it might be filled up and choked, and entirely lose its character, and a destruction of the subject of demise take place, and yet no breach of the agreement be committed; although the destruction were caused by the same natural agencies that cause the decay of the structure of a house, and the operation of which as to a house the covenantor would certainly be bound to prevent. Accordingly, a covenant to repair, when it is expanded in a formal lease, commonly includes the words "cleanse and scour," where there is a subject to which those words may properly apply. Davidson's Prec. of Conv. vol. v. pp. 135, 154, 222, 239, 249, 443, 451, 8 & 9 Vict. c. 124, s. 1, and sched. 2. This agreement, in fact, divides the duties to be performed in respect of the house and grounds into two parts, one of which is to be performed by the tenant, and the other by the landlord; there are no words on the tenant's side which can be made to include the duty of cleansing this piece of water; and it follows, therefore, that it is included in the landlord's undertaking, where a word is found that may properly express it. The tenant therefore is entitled to succeed on this breach of the agreement, for though the pleadings are referred to, the special case raises the

(1) 8 T. R. 602.

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whole question between the parties. But, further, the landlord being bound to cleanse the water, the accumulation which caused the nuisance took place by his default. By virtue of the proceedings under the Nuisances Removal Act, the cost of abating the nuisance became a charge on the premises, and he was bound to pay it under the agreement. Or, if not strictly a charge on the premises, it was, at least, a charge in respect of the premises, which was within both the words and the meaning of the agreement: *Payne* v. *Burridge* (1); *Tidswell* v. *Whitworth* (2); *Thompson* v. *Lapworth* (3); *Sweet* v. *Seager* (4); *Hurst* v. *Hurst.* (5) There is more reason to include in the undertaking a charge for a benefit to the property of a permanent nature (as this is) when the undertaking is on the side of the landlord than when it is on the side of the tenant. For that portion of the expenses, therefore, which was incurred in removing the nuisance, the plaintiff is at least entitled to recover.

Dixon (*Garth, Q.C.*, with him), for the defendant, was not called upon.

KELLY, C. B. Our judgment must be for the defendant. The plaintiff puts his claim, in the first instance, on a clause in the agreement of demise, by which the landlord undertakes to keep the premises in repair; and he contends that under these words the landlord was bound to keep the ornamental water in good and substantial repair, and committed a breach of his agreement in allowing the mud to accumulate. We are all of opinion that this is not the meaning of the contract. It could, at the utmost, only apply so far as to bind the landlord to do such repairs as, for instance, might be required to prevent the sluices from bursting, and the water from going over its banks and flooding the neighbouring lands; but it cannot bind him to cleanse and scour the stream. There has, therefore, been no breach of this part of the agreement; and that disposes of the plaintiff's whole demand with the exception of the sum of 21*l.*, which is claimed on a distinct ground, namely, the order of the justices for the removal of the nuisance.

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(1) 12 M. & W. 727.

(2) Law Rep. 2 C. P. 326.

(3) Law Rep. 3 C. P. 149.

(4) 2 C. B. (N.S.) 119. 3 Jur. N.S. 1588

(5) 4 Ex. 571.

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With respect to this order, it is clear that the whole proceedings before the magistrates referred only to the removal of that portion of the mud which formed a public nuisance—that is, the portion opposite to the cottages. Of the expense incurred in the removal of this mud, part was incurred before the order, and part after; and the plaintiff now contends that the making of this order, and the removal of the mud by the tenant in pursuance of it, constituted a charge on the premises which the landlord is bound to repay him, under the stipulation in the agreement by which he undertakes to pay all charges payable in respect of the premises. But it is clear that even as to the part of the expense incurred after the order, no charge was created. In order to constitute a sum payable in consequence of a nuisance a charge on the land, it is necessary to shew, first, that the nuisance arose from the act or default of the owner of the premises. But the nuisance did not arise from the act or default of the landlord, unless it is shewn that the landlord was bound to cleanse the stream, which we have already decided he was not. But if this were otherwise, and the order were expressly made on the owner, it must be shewn, secondly, that the order has been disobeyed; and thirdly, that the public authorities have themselves entered and at their own cost removed the nuisance. In that event the expenses so incurred would constitute a charge on the premises under the 19th section; but inasmuch as the payment was made by the tenant himself, that provision of the act does not come into operation. Even if a charge had been constituted, I do not see how, unless the charge were enforced so as to compel the tenant to pay, he could recover against the landlord. The tenant, however, has in fact paid the money without compulsion, and in his own wrong. On no part of his claim, therefore, has he any right to recover.

BRAMWELL, B. I am of the same opinion. I never had any doubt that the agreement to repair had no application, or that the order of the justices referred to no more than the public nuisance opposite the cottages. That reduces the case to the seven guineas expended after the date of the order; and upon this point, the plaintiff's argument at first looks plausible, but will not bear examination. This nuisance is, in fact, an occupation nuisance, of the same kind as if the tenant had erected a pig-stye or a mixen. If a nuisance were created by the act of nature, as by the brook overflowing and leaving a marsh, the case might be different, because that would not be due to the occupier's default. But this is nothing of the kind; by occupying the land the tenant has caused the nuisance; and that is the language of the order, which states it to have arisen by his own act or default, and directs him to remove it. The plaintiff's case, therefore, entirely fails.

CHANNELL, B. I am of the same opinion. The words relied on do not cast on the landlord the duty of cleansing the water. The only way of arguing the point would be to say that certain things to be done about the premises were excepted and thrown upon the tenant, and that the landlord was bound to do the rest; but that argument cannot prevail.

The whole claim, therefore, is disposed of, except as to the 21*l.*; and as to this, the tenant alleges that the landlord was bound under the agreement to pay all charges payable in respect of the premises, and that this is a charge. But there is no pretence for saying that any part of this sum was a charge on the lands within the meaning of the agreement. It is quite consistent with the proceedings that the nuisance is a tenantable nuisance, and it is in fact treated in the order as having arisen by the tenant's own act and default, and not by the act or default of the landlord. Further, it is only when money has been paid under compulsion that the person paying it can recover the amount as money paid on account of a third person, and this money has not been so paid. On all grounds, therefore, the plaintiff's case fails.

PIGOTT, B., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *Hume & Bird.*
Attorney for defendant: *E. Bromley.*

THE MERCANTILE AND EXCHANGE BANK *v.* GLADSTONE AND OTHERS.

1868
June 1.

Ship and Shipping—Transfer of Ship on Voyage—Master—Bill of Lading "free of Freight."

9 QB 448
10 Ex 333
2 Asp Cas 642, 651

F. & Co., shipowners at Liverpool, requested the defendants to purchase for them, through the defendants' Calcutta house, a quantity of cotton, to be shipped on board two ships of F. & Co., which were then on their way to Calcutta, consigned to the defendants; and, as the goods were to be shipped on owners' account, they consented to a nominal rate of freight being inserted in the bill of lading. Before the execution of the order, one of the ships, the *Royal Sovereign*, was transferred to the plaintiffs. The defendants, through their Calcutta house, executed the order, and, having no notice of the transfer to the plaintiffs, shipped part of the cotton on board the *Royal Sovereign*, the master, who also had no notice of the transfer, signing bills of lading to the defendants' order "freight for the said goods free on owners' account." Before the arrival of the ship in England F. & Co. stopped payment, and the defendants claimed to stop the goods in transitu. On her arrival the plaintiffs immediately took possession of the ship, and claimed freight:—

Held, on a case stated, raising the question whether the plaintiffs were entitled as against the defendants to freight, or to a sum equivalent to freight, for the carriage of the goods, that the plaintiffs were not so entitled.

Per Kelly, C.B., that the master, until he received notice of the change of ownership, retained the powers which had been conferred upon him by the original owners, so far as to bind the new owners by contracts for the carriage of goods entered into by him pursuant to his original instructions.

SPECIAL case stated without pleadings.

Fernie & Co. were shipowners at Liverpool. The defendants carried on business as merchants at Liverpool and at Calcutta. On the 11th of December, 1865, one of the firm of Fernie & Co. stated to the defendants that two of their ships, the *Royal Sovereign* and the *Henry Fernie,* would soon be arriving at Calcutta, and requested the defendants to buy for them 10,000 bales of cotton to help them with their cargoes, as freights were bad. This order was telegraphed by the defendants to their Calcutta house. In subsequent communications from Fernie & Co., which were received by the defendants' Calcutta house before the execution of the order, Fernie & Co. desired that the cotton might be shipped immediately without waiting for their own ships, and expressed a hope that their ships might obtain good rates of freight.

The *Royal Sovereign* sailed from England on the 23rd of September, 1865, consigned to the defendants' house at Calcutta, and she arrived there about the beginning of February, 1866, before the complete execution by the defendants of the order. She was unloaded and ready to take a fresh cargo in the beginning of March, and her master, failing to obtain a charter for her, put her up as a general ship for Liverpool.

The defendants' Calcutta house executed the order, and shipped 3782 bales on the *Royal Sovereign,* and the master signed two bills of lading for 3300 bales and 482 bales respectively, making the goods deliverable to the defendants' order "freight for the said goods free on owners' account." They also shipped on the same vessel 471 bales of cotton for other persons, not interested in the vessel, for which they paid freight at the current rate.

The master had no express instructions or authority from Fernie & Co., or from any other person, to sign bills of lading freight free; but in other similar transactions between the defendants and Fernie & Co. the defendants had stated to Fernie & Co. that when they shipped cargo for owners' account in owners' own ships they invariably inserted in the bills of lading a nominal rate of freight. This course is frequently adopted in the East India trade, and Fernie & Co. consented to its adoption in case the defendants should ship for them cargo in their own ships. Previously to the arrival of the ship at Liverpool Fernie & Co. knew that the cotton had been shipped on board the *Royal Sovereign,* but they were not expressly informed that it had been shipped freight free.

In the month of December, 1865, Fernie & Co. agreed to sell the *Royal Sovereign* to the British and American Steam Navigation Company, Limited, and it was arranged between them that the company should receive all the profits, and bear all the losses, as the case might be, of the voyage, and that Fernie & Co. should receive only the usual commission; but no notice of this arrangement was communicated to the defendants, or to the master. Fernie & Co. were also appointed ship's husbands of the company, and had the management and control of their affairs.

On the 12th of January, 1866, before any formal agreement or transfer of the ship to the company was executed, an agreement was entered into between the plaintiffs, the company, and Fernie & Co., by which, in consideration of an advance of 43,000*l.* by the plaintiffs to the company, the company agreed to transfer the *Royal Sovereign* and another ship to the plaintiffs, and David Fernie, in whose name the *Royal Sovereign* was registered, agreed to hold her in the meantime as trustee for the plaintiffs. On the 27th of January D. Fernie executed to the plaintiffs a bill of sale of the ship, which was registered on the 11th of May, 1866.

The *Royal Sovereign* sailed from Calcutta on the 17th of April, 1866, and arrived at Liverpool on the 27th of August; and Fernie & Co. having on the 16th of May suspended payment, the defendants' Liverpool house, to whom the bills had been forwarded and indorsed in the usual course of business, claimed to stop the goods in transitu, and demanded delivery of the 3782 bales freight free.

The plaintiffs, immediately on the arrival of the ship, took possession of her and collected her freight; and they claimed from the defendants freight, or a sum equal to what would have been the freight at the current rate, for the 3782 bales.

Since the purchase of the cotton in India a great fall had taken place in prices, which continued after the arrival of the ship; and after giving credit for a sum received from Fernie & Co. by means of letters of credit on the Royal Bank of Liverpool, the defendants were unable to obtain the amount they expended in the purchase of the cotton; and there was still due to them in respect of the transaction a sum exceeding the estimated amount of freight claimed by the plaintiffs.

The cotton was ultimately delivered by the plaintiffs to the defendants under an arrangement, and this action was brought to try the right of the defendants to have the goods delivered to them without paying freight, or a sum in the nature of or equivalent to freight, and it was to be taken that the plaintiffs were the proper persons to sue if any one was so entitled. The amount was agreed at 1985*l*.

The Court were to be at liberty to draw inferences of fact. The question for the opinion of the Court was,—were the defendants entitled to delivery of the said cotton without any payment in respect of its conveyance on board the said ship?

Sir W. B. Brett, Q.C. (S. G.), (*R. G. Williams* with him), for the plaintiffs. There never was any binding contract with the

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plaintiffs compelling them to carry the cotton freight free. It is admitted that there was no express contract with them; and no such contract can be implied from the circumstances. The master as such has no power to use the ship except to earn freight, and can no more sign bills of lading freight free, than he can sign bills of lading for cargo which is never put on board: *Grant* v. *Norway*. (1) It is possible, indeed, that a master might sign such bills for goods shipped by the owner: but in January, 1866, the ship had become the property of the plaintiffs, and the goods were not their goods. Neither, for the same reason, could the instructions of Fernie & Co. have authorized the master; for he had ceased to be their servant, and had become the servant of the plaintiffs, who had given him no such instructions.

[KELLY, C.B. When a ship is sold in the course of her voyage, whose agent is the master after the sale?]

Probably, as the captain must manage the ship, from the time of the sale the purchaser adopts the captain as his captain, and the seller gives him up; and in the ordinary course of things, from that time, though the captain may retain his own rights against the original owner, and refuse to substitute the purchaser's liability, yet what he does he does as agent for the purchaser, who may ratify and adopt it; but he cannot bind the purchaser in the exercise of unusual powers intrusted to him by the former owner, and not communicated to the purchaser. But even the instructions of Fernie & Co. were not followed, for they gave no authority to sign bills freight free, but only at a nominal rate of freight, which is a substantially different thing. (2) Again, the authority was only to ship cotton of Fernie & Co. on board a ship of Fernie & Co.'s, and this was not done.

[MARTIN, B. How can you establish a contract by the defendants with the plaintiffs to pay freight? If I meet a man at York with a horse and cart, and he bargains to carry goods for me to London, can the owner of the horse and cart sue me for work and labour?]

The defendants and the master were no doubt mistaken when they shipped the cotton, but it is their own mistake; they made it at their own risk, and cannot themselves take advantage of it. Having used the plaintiffs' ship they must pay for it, though they did not intend to do so, as in the case of *Rumsey* v. *North Eastern Railway Company* (1) where a railway passenger taking with him a portmanteau in an excursion train where luggage was not allowed, was held liable to pay carriage for it; although he could not have sued the company for its loss: *Cahill* v. *London and North Western Railway Company.* (2)

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(1) 10 C. B. 665.

(2) It was suggested that a nominal rate of freight meant 5*s*. a ton, or 1*s*. a bale, see *Brown* v. *North*, 8 Ex. 1; 22 L. J. (Ex.) 49.

[MARTIN, B. The passenger knew that luggage was not carried by that train, and chose to take it; but how can we tell that the defendants would have shipped the cotton on board this ship if they had not supposed it to be freight free?

BRAMWELL, B. Suppose a person by the favour of the captain of a passenger steamer, gets a pass from St. Thomas's to London; could the owners of the vessel recover the passage money from him?]

The observations of Crompton and Blackburn, JJ., in *Gumm* v. *Tyrie* (3) favour the opinion that he would be liable; he ought to have known that the captain had no authority to grant passes. Secondly, supposing the goods were well shipped freight free, the contract could only be that they should be carried freight free so long as they remained owners' goods, that is, on the present assumption, the goods of Fernie & Co. But by the stoppage in transitu and the subsequent events they ceased to be the goods of Fernie & Co., and became the goods of the defendants; and if the defendants are allowed to get them without paying freight, the inequitable result will be, that they will get back at the Liverpool price goods which were shipped by them at the Calcutta price. The plaintiffs are therefore entitled, on the resumption of possession by the defendants, to freight, or a sum equivalent to freight, on a quantum meruit: *Turner* v. *Liverpool Dock Trustees.* (4)

Holker, Q.C., for the defendants, was not called upon.

KELLY, C.B., [after stating the facts, proceeded]:—The state of things at the time of the shipping the cotton was this: that this ship had undoubtedly belonged to Fernie & Co.; it had been addressed by them to the defendants' house at Calcutta, and had been received there; the defendants therefore became the agents for Fernie & Co. in respect of the ship, and the cotton having been purchased, was shipped, in strict performance of the instructions which the defendants had received from Fernie & Co., on board this ship, freight free on owners' account; for I do not conceive that there is any substantial difference between the expressions freight free and at a nominal freight; at least no such distinction appears on the case, and it may be disregarded.

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(1) 14 C. B. (N.S.) 641; 32 L. J. (C. P.) 244. 10 Jur NS 208

(2) 10 C. B. (N.S.) 154; 30 L. J. (C.P.) 289. 8 Jur NS 1063.

(3) 4 B. & S. 680, at pp. 709, 714; 33 L. J. (Q.B.) 97, 109, 112.

(4) 6 Ex. 543, at p. 568; 20 L. J. (Ex.) 393.

There can be no doubt that if the ship had continued to belong to Fernie & Co., no question could have arisen; the cotton would have been delivered to them upon payment of its price to the defendants; or if in the meantime they had become bankrupt, their bankruptcy would not have derogated from the rights which the defendants would have acquired under their contract; and if their assignees had failed to pay the price, and a right of stoppage in transitu had therefore arisen in the defendants, the defendants would have been entitled to retain possession of the goods upon the terms and conditions of the contract, and among others on a condition entitling them to retain them, freight free, or in other words, without paying any freight at all.

But before the vessel had arrived at Calcutta, Fernie & Co. had parted with it; and when the shipment took place the ship really belonged not to Fernie & Co., but to the plaintiffs. It is insisted that the ship having become the property of the plaintiffs, the master was no longer the agent for Fernie & Co., and no longer bound by any instructions he might have received from them, or any contract into which they might have entered; but that he was agent for the plaintiffs, and had no power whatever to enter into a contract to convey goods from Calcutta to Liverpool freight free. I am, however, of opinion that the master retained whatever authority he had possessed, derived from Fernie & Co. as owners of the ship, until he should receive notice of the change in the ownership. It would be impossible to see any end to the inconvenience, injustice, and breaches of contract which must follow if when a master has proceeded in command of his ship to some foreign port, having received instructions as to how he is to deal with the ship, what ports he is to proceed to, and what contracts he may make, every act which he may have done under the authority which he once possessed may be treated as a nullity by reason of an unknown, secret conveyance of the ship by her former owner. I think that the master was bound by all the acts, all the instructions, all the authorities which had emanated from Fernie & Co., the former owners, until the plaintiffs had given notice to the master that they had become the owners, and that any authorities derived, or instructions received, from Fernie & Co., had ceased; and that until that notice the master was not bound to act, except in the interests of Fernie & Co. At the time, therefore, when this bill of lading was signed, the captain was acting under the authority and instructions of Fernie & Co.; and the bill of lading being in strict performance of those instructions is valid and binding. The defendants, having a right to stop the goods in transitu, possessed that right as they would have possessed it if Fernie & Co. had still continued to be the owners of the ship, and were therefore entitled to receive them, freight free, at Liverpool.

I do not think it necessary to pronounce any opinion upon the point which was raised in argument, whether if a master entered into a contract to convey goods freight free, which was not within his authority, and the goods were actually conveyed under that contract, the owners could say that a new contract which never was made arises by implication to pay freight at the current rate. That question does not arise here, because the present owners, the plaintiffs, are upon the grounds already stated, bound by the authority given on the part of the former owners. I therefore forbear from making any comment upon the point.

MARTIN, B., concurred.

BRAMWELL, B. I am also of opinion that the defendants are entitled to our judgment. The case may be conveniently considered by first examining what would have been the result supposing Fernie & Co. had continued to be the owners of the ship. Now, I agree that presumably, and in the ordinary course of things, there is no consideration for a contract to carry goods freight

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free. The vessel is to earn freight, and not to carry goods for nothing. It is like the case of a shopman who has authority to sell his master's goods, but not to give them away; and it is very doubtful whether a master has authority to carry his owner's goods freight free, even if there is no right reserved to the person who actually ships them. But all difficulties with regard to that are removed by its being found in the case that the master had authority to do what he did; for I agree with the Lord Chief Baron that a nominal rate of freight must be taken as meaning no freight at all. Therefore I take it that these goods were well shipped upon the terms "freight for the said goods free upon owners' account." But it is said they were freight free on the assumption that they continued to be owners' goods, and that the defendants having stopped them in transitu they are so no longer. I think not; I think they were freight free, whatever might turn out to be the case; for why should the defendants have mentioned this matter to Fernie & Co., and got their consent to it except for the contingent benefit which, as the case turns out, it has rendered to them? It seems to me, therefore, that when Fernie & Co. consented to this course, they consented that, even though there should be a right on the part of the defendants to take possession of the goods when they arrived, still they must be carried freight free. Therefore, nothing has taken place which ought not to have been in the contemplation of the parties at the time.

Next, does the sale to the plaintiffs make any difference? One may answer that question by another, why should it? How can it possibly be that the defendants, who would not have been liable to Fernie & Co. for freight on these goods, shall be liable to some one else because, before they shipped the goods, Fernie & Co. sold the ship? It seems to me that no other argument is necessary, the sale being unknown to them. I express no opinion on the question whether in case of the sale of a ship when she is on a voyage, the buyers are bound to do a thing which the captain contracts for them that they shall do. There may be difficulties in an action on the contract to carry, because it may be said that for that purpose the captain was not their captain. But I am very clearly of opinion that they cannot recognize the act of the captain in receiving goods on board, and at the same time say that

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they will not be bound by the terms upon which he received them. It seems to me, therefore, that the fact that the plaintiffs are the buyers of the ship, makes no difference in the liability of the defendants; it does not make them parties to a contract into which they never entered. And this observation distinguishes the case from *Rumsey* v. *North Eastern Railway Company* (1); there the party did not intend to pay for the carriage of his portmanteau, but he conducted himself as if he did, because he came with the portmanteau, knowing that it was not carried gratis.

It is said that this is a hard case, and an inequitable one; that the defendants will get a benefit which it was not in the contemplation of the parties they should get. But that is not so; when they stipulated to ship these goods freight free, and yet with a power of preventing their delivery by making the bill of lading to their own order, they stipulated that by virtue of that arrangement they should have the benefit of this piece of good fortune if it should occur.

CHANNELL, B., concurred.

Judgment for the defendants.

Attorneys for plaintiffs: *Chester & Urquhart, for Haigh, Son, & Co., Liverpool.*

Attorneys for defendants: *Gray & Co., for Lace & Co., Liverpool.*

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(1) 14 C. B. (N.S) 641; 32 L. J. (C.P.) 244. 10 Jur NS 208.

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May 30.

PEARSON AND OTHERS *v.* THE COMMISSIONERS OF INLAND REVENUE.

Stamp Duty—Lease for more than Thirty-five years—13 & 14 *Vict. c.* 97—17 & 18 *Vict. c.* 83.

A lease for a term of 45 years at a substantial rent for the first 23 years, and at a peppercorn during the remaining 22, is not a lease "exceeding 35 years at a yearly rent" within the meaning of 17 & 18 Vict. c. 83, Sch. Tit. Lease, and is not liable to the duty imposed by that statute.

CASE stated pursuant to 13 & 14 Vict. c. 97, by the Commissioners of Inland Revenue, to enable George Pearson and others to appeal against their decision as to the stamp duty chargeable on the indenture hereinafter mentioned.

The indenture, dated the 28th of May, 1867, was made between Owen Florance, Lewis Ward, and Henry Sykes Stephens, of the first part, Edward Blackett Beaumont of the second part, and the said George Pearson and Thomas Routledge, James Edward Robinson, William Booth, and James Moxon of the third part; and after reciting that the said Beaumont had agreed in consideration of the several rents, royalties, covenants, &c., thereinafter contained on the lessees' part, to grant a lease to the said parties of the third part, their executors, administrators, and assigns, for the term of forty-five years, of certain beds or seams of coal, and that the said parties of the first part (mortgagees) had agreed to concur in the demise, it was witnessed that in pursuance of the recited agreements, and in consideration of the rents, covenants, &c., thereinafter reserved and contained, the said Florance, Ward, and Stephens, at the request of Beaumont, did thereby grant and demise, and the said Beaumont did thereby grant, demise, and confirm unto the said Pearson, Routledge, Robinson, Booth, and Moxon, their executors, administrators, and assigns, the beds or seams of coal therein particularly described, with authority to the said lessees to work the same, to hold the said beds or seams of coal, and the authorities, &c., thereby demised unto the said lessees, their executors, administrators, and assigns, as tenants in common from the 1st of August, 1866, for the term of forty-five years, paying therefore during the said term on the 1st of October and the 1st of April in every year, the rents and royalties thereinafter specified, viz. (amongst other payments) during the first twenty-three years of the said term of forty-five years thereby granted, the rent or annual sum of 3500*l.*; and during the residue of the said term, after the expiration of the said twenty-three years thereof, the rent of a peppercorn, if demanded; the said rent of 3500*l.* to be paid by two equal half-yearly payments on the days aforesaid in every year, the first of such half-yearly payments to be made on the 1st of October, 1866.

This indenture was presented by Pearson and the other parties of the third part, on the 3rd of June, 1867, to the Commissioners of Inland Revenue under the provisions of 13 & 14 Vict. c. 97, s. 14, and their opinion was desired as to the stamp duty with which it was chargeable. The Commissioners were of opinion that it was chargeable under the 17 & 18 Vict. c. 83 (Schedule), as a lease for a term of years exceeding thirty-five, with the sum of 113*l.*, being 109*l.* 10*s.* for ad valorem lease duty, and 3*l.* 10*s.* for progressive duty. Thereupon that sum was paid to them, but the appellants not being satisfied with their decision required them to state this case. The question for the opinion of the Court was, whether the indenture of lease of the 28th of May, 1867, was chargeable with the stamp duty of 113*l.*, or with any other and what amount of stamp duty.

The 13 & 14 Vict. c. 97, Sch. Tit. Lease, imposes the following duties:—

"Lease or tack of any lands, &c., at a yearly rent without any sum of money by way of fine, premium, or grassum paid for the same, where the same shall exceed 100*l.*, then for every 50*l.*, and also for any fractional part of 50*l.*, 5*s.* Lease or tack of any kind not otherwise charged, 1*l.* 15*s.*"

The 17 & 18 Vict. c. 83, Sch. Tit. Lease, fixes the duty on a lease of lands, &c., "for any term of years *exceeding thirty-five* at a yearly rent with or without any sum of money by way of fine, &c.," where the yearly rent shall exceed 100*l.*, at 1*l.* 10*s.* for every 50*l.*, and also for any fractional part of 50*l.* It also enacts that where any such lease, &c., as aforesaid, shall be granted in consideration of a fine, premium, or grassum, and also of a yearly rent, such lease shall be chargeable also in respect of such fine, &c.,

with the ad valorem stamp duties granted under the title of "conveyance" in the schedule annexed to 13 & 14 Vict. c. 97.

May 7. *Manisty, Q.C.*, for the appellants. The lease in this case is not for "a term exceeding thirty-five years at a yearly rent" of 3500*l.* The duty imposed is essentially an ad valorem duty, and if a lessee is to pay 1*l.* 10*s.* for every 50*l.* of rent instead of 5*s.*, the lessor ought actually to receive the rent reserved through the whole term. But here he is only to receive it for a number of years less than thirty-five, viz. twenty-three. Although therefore this is, in one sense, a lease for a term exceeding thirty-five years, it is not a lease for that term *at a yearly rent* of 3500*l.* The term is substantially for twenty-three years only.

[BRAMWELL, B. It may be that the present case comes under the head of "lease not otherwise charged," in the 13 & 14 Vict. c. 97, or under that of a "lease granted in consideration of a fine or premium" in 17 & 18 Vict. c. 83.]

It falls within the general words, "lease of any lands at a yearly rent" in the earlier statute. The letting at a peppercorn for the last twenty-two years cannot be considered as a premium.

Sir J. B. Karslake, Q.C. (*A.G.*), (*Crompton Hutton* with him), for the Crown. The Commissioner's assessment is made on a correct principle. The later act imposes a higher duty on terms above thirty-five years, and here there is a term of forty-five. But then it is said the words "yearly rent" must mean rent payable every year throughout the term from the beginning to the end of it. This construction is not a reasonable one. The act was passed with reference not so much to the amount of rent which might be reserved as to the period comprised in the term. If the appellant's view be correct, the increased duty on long terms will be easily evaded by private arrangements between lessors and lessees, as to the time of payment of the rent reserved.

Manisty, Q.C., in reply.

Sir J. B. Karslake, Q.C. (*A.G.*), in rejoinder.

Cur. adv. vult.

May 30. The judgment of the Court (Kelly, C.B., Martin and Bramwell, BB.) was delivered by

KELLY, C.B. The question in this case is, whether a lease of a coal mine for the term of forty-five years, at a rent of 3500*l.* a year for the first twenty-three years, and of a peppercorn during the remaining twenty-two years, is subject to the ad valorem stamp duty of 5*s.*, or of 1*l.* 10*s.*, for every 50*l.* of such annual rental.

By the 13 & 14 Vict. c. 97, a lease of any lands or tenements at a yearly rental exceeding 100*l.* without any sum of money by way of fine, is liable to the stamp duty of 5*s.* only for every 50*l.* of such rent. Then the 17 & 18 Vict. c. 83, enacts that a lease of any lands or tenements "for any term of years exceeding thirty-five, at a yearly rent, with or without any sum of money by way of fine, shall be liable to the stamp duty where the yearly rent shall exceed 100*l.*, of 1*l.* 10*s.* for every 50*l.*"

It is contended for the Crown, that the whole term in this case being forty-five years, although the term or portion of the term during which the rent of 3500*l.* a year is payable is only twenty-three years, that the higher duty attaches in respect of the rent, as if that rent of 3500*l.* a year had been payable during the entire term of forty-five years. On the other hand, it is insisted that the lease is in substance and reality for the term of twenty-three years at a rent of 3500*l.* a year to commence presently, and for another term of twenty-two years at a peppercorn, to commence in futuro, that is to say, at the expiration of the first term; and that the duty, which is an ad valorem duty, must have been intended by the legislature to be charged in respect of the real amount of the rent payable, that is, upon 3500*l.* a year during the period of twenty-three years. The language of the statute considered literally may seem to support the argument for the Crown; but we are of opinion that the words "any term of years exceeding thirty-five at a yearly rent," may not unreasonably be read as meaning and intending a period of thirty-five years during which the rent upon which the ad valorem duty is to attach shall be payable, and that the words "where the yearly rent shall exceed 100*l.*, then for every 50*l.* 1*l.* 10*s.*" may be read "where the yearly rent during such term (of thirty-five years) shall exceed," &c. Were it otherwise, the duty, which is undoubtedly an ad valorem duty, and which the legislature must have intended should have reference and bear proportion to the value and amount in respect of which it is to be

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imposed, would refer and be proportionate to a much larger amount, in direct opposition to the principle that the imposition of a tax upon a subject must be in accordance with the spirit as well as the letter of an act of parliament. Further, if such a construction were to prevail, were a lease to be granted at a rent of 3500*l.* a year for the first three or five years, and thenceforth for fifty or one hundred years at a nominal rent, a very heavy tax would be imposed upon the lessee, out of all proportion beyond the ad valorem duty upon the real amount of the rent, which the legislature intended only to be charged in respect of a value or amount some twenty or thirty times greater.

If the question raised in this case could have been foreseen, it might have been avoided by the grant of two leases, one for twenty-three years at 3500*l.* a year to commence presently, and then for twenty-two years at a peppercorn, to commence at the period of the expiration of the first. And it seems to us that, for the purpose of taxation, the instrument in question may be treated according to its legal operation; that is to say, as creating two terms, the one to commence in præsenti, the other in futuro. If the rent of 3500*l.* had been reserved for the first year only, and payable in advance, it would in legal effect have been a lease with a premium, and without any rent payable, strictly speaking, at all; and in that case again it might have been necessary to consider the substance, and not the form, of the instrument in determining the amount of the duty.

We are not insensible of the difficulty of applying any just and equitable, and at the same time reasonable, principle to the great variety of leases which are now actually granted in many parts of England, and especially in the metropolis, sometimes at a nominal rent for the first three, four, or five years, and afterwards, perhaps, for ninety-nine years, at 100*l.*, or 500*l.*, or 1000*l.* a year. We can only express the hope that before any question shall arise upon leases of this nature, the legislature will amend the existing acts of parliament, and impose the duties really intended to be charged in clear and definite language, and bearing that proportion to the rent or sums to which the duties are to attach, which is really intended whenever ad valorem duties are imposed. We are of opinion, therefore, that in this case our judgment ought to be for the minor duty imposed under the 13 & 14 Vict. c. 97.

Judgment for the appellants.

Attorneys for appellants: *Ridsdale & Cradock.*
Attorney for respondent: *The Solicitor to the Inland Revenue.*

EXLEY AND ANOTHER *v.* INGLIS AND ANOTHER.

June 2.

Deed under Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Trustees of Deed—Relation of Title—Fraudulent Preference—Act of Bankruptcy.*

4QB378
5Ch476

Where a deed under s. 192 of the Bankruptcy Act, 1861, conveys all the estate and effects of the debtor to trustees, to be held and administered by them for the benefit of the creditors, as if the debtor had been adjudicated bankrupt, the title of the trustees has by virtue of s. 197 relation back; and they can bring trover for goods fraudulently transferred by the debtor before the execution of the deed, without doing any act to avoid the transaction.

TROVER for yarn alleged to be the subject of a fraudulent preference.

The yarn had been sold by the defendants to Collier, on the 11th of August, 1866; its quality was complained of by him, but the defendants refused to take it back, and it remained on his hands.

On the 4th of September, the defendants, being informed that Collier was in difficulties, took back the yarn and returned the bill which they had taken for the price.

On the 7th of September, Collier executed a deed under s. 192 of the Bankruptcy Act, 1861, made between the debtor, the plaintiffs as trustees, and the creditors, by which the debtor conveyed to the plaintiffs all his real and personal estate, on trust to collect and realise the same, and to hold the moneys to arise therefrom "in trust to apply and administer the same for the benefit of the said creditors in like manner as if the said debtor had been at the date hereof duly adjudged bankrupt;" and it was declared that "the trustee or trustees for the time being of these presents, as well also the said creditors, shall have all the powers, rights, privileges, and remedies with respect to the said debtor and his estate and effects, and the management, realisation, collection, and recovery of the same, as are now possessed or may be used or exercised by assignees or creditors with respect to a bankrupt, or to his estate and effects. . . . . And it is also declared that all questions relating to contracts by the said debtor, or to the compounding of debts, or the submitting disputes to arbitration, or the payment of costs, charges, and expenses, and the payment of wages or salaries to clerks, servants, labourers, workmen, or apprentices, or powers or questions relating to the discharge of apprentices, or to creditors having securities for their debts, or to the allowance to the said debtor, or to the dividends under this deed, or powers or questions relating generally to the trust and estate, the creditors, or their debts, and not herein expressly provided for, shall be exercised and dealt with by the trustees or trustee, according to the English Bankrupt Law."

The plaintiffs were not informed of the transaction between Collier and the defendants until shortly before this action was commenced in the year 1868. They now sought to recover from the defendants the value of the yarn.

The cause was tried before Mellor, J., at the Manchester spring assizes, 1868, and the learned judge put to the jury the question whether Collier returned the goods which had been previously sold and delivered, intending to prefer the defendants to his other creditors, in contemplation of preparing and executing a deed of composition, and with the object of preventing the distribution of his effects among his general creditors; the jury returned a verdict for the plaintiffs. Leave was reserved to the defendants to move to enter a nonsuit or a verdict for them, on the ground that the plaintiffs were not in the same position as assignees of a bankrupt, and were bound by the act of Collier, under whom they claimed; and on the ground that the plaintiffs could not maintain this action unless they disaffirmed the transaction, and that there was no evidence that they had disaffirmed it. A rule having been obtained accordingly,

Temple, Q.C., and *R. G. Williams*, shewed cause. The jury have found that the transaction was a fraudulent preference; and every fraudulent preference not being payment of money, and probably even that, is an act of bankruptcy: *Ex parte Simpson.* (1) This transfer was, therefore, an act of bankruptcy, and might have been proceeded on as such; and might, in the case of an adjudication of bankruptcy founded on a creditor's petition, have been treated as an act of bankruptcy, if subsequent to the petitioning creditor's debt; and probably even in case of an adjudication obtained on the application of creditors, though in proceedings originated by the bankrupt's petition, it might have been so treated, if subsequent to the debt of *any* creditor: *Stevenson* v. *Newnham.* (2) In that case, therefore, the assignees' title would have had relation back, the transfer would have been absolutely void, and the assignees might have recovered in trover without any demand: 1 Smith's L. C., note to *Cooper* v. *Chitty,* at p. 466 (6th ed.); *Stansfeld* v. *Cubitt.* (3) The only question, therefore, is, whether the title of the trustees under the deed has the same relation back to acts of bankruptcy as the title of assignees in bankruptcy. On this point *Topping* v. *Keysell* (4), is a direct authority in favour of the plaintiffs, and shews that by virtue of s. 197 of the Bankruptcy Act, 1861, trustees under a debtor's deed of assignment have the same powers and rights as assignees, and amongst others the right of treating previous fraudulent transfers as void. This is the distinct ground of the judgment. In that case the title of the assignees was held to relate back to the bill of sale which preceded the fraudulent preference; here it relates back to the fraudulent preference itself, and it is not disputed that there was then a sufficient creditor's debt. The case of *Williams* v. *Cadbury* (5), and *Porter* v. *Kirkus* (6), are instances of the application of s. 197.

Holker, Q.C., and *Armitage,* in support of the rule. It is clearly settled that in an adjudication on the bankrupt's petition, a previous fraudulent preference cannot be treated as an act of bankruptcy, and that the title of the assignees does not therefore relate back to it: *Stevenson* v. *Newnham* (7); 1 Smith's L. C., note to *Cooper* v. *Chitty,* at p. 466 (6th ed.). If the assignees wish, in

(1) De G. 9.

(2) 13 C. B. at p. 301; 22 L. J. (C.P.) 110. 17 Jur at 600,

(3) 2 De G. & J. 222. 17 Jur 395.

(4) 16 C. B. (N.S.) 258; 33 L. J. (C.P.) 225. 10 Jur NS 774

(5) Law Rep. 2 C. P. 453.

(6) Law Rep. 2 C. P. 590.

(7) 13 C. B. 285, 302; 22 L. J. (C.P.) 110, 114. 17 Jur 600

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such a case, to undo the transaction, they must, as in the case of a similar transaction taking place prior to the petitioning creditor's debt, or more than twelve months before the petition, first disaffirm it; and as this disaffirmance is necessary to re-vest the property in the assignees, it must be done before action brought. Now even on the assumption that trustees of a deed under the Bankruptcy Act, 1861, are in the same position for this purpose as assignees in bankruptcy, the assignees to whose position theirs must be assimilated, are the assignees in an adjudication founded on the debtor's petition, for in such deeds the debtor is in most cases the active party, and may be said in a manner to obtain an adjudication against himself. It follows, therefore, that the title of the plaintiffs does not relate back, and as no demand or act of disaffirmance was proved, they must be nonsuited. This is so on the reason of the thing, and the authority relied on to prove the contrary fails. For the case of *Topping* v. *Keysell* (1), may be supported on grounds quite independent of the doctrine of relation as applied to trust deeds; for, first, the creditor who had taken everything under the bill of sale previous to the fraudulent preference there sued upon, had conveyed all his rights to the trustees (2), and they were therefore entitled to recover the goods; secondly, the trustees had actually disaffirmed the transaction, and demanded back the goods. (3) It was, therefore, at the utmost, sufficient to decide that trustees can avoid a fraudulent preference, and it was unnecessary to pronounce any judgment on the question of relation, and what was said upon that point was said obiter. But even with respect to this point, the case was decided on the narrow ground that there had been a petition, and that the trust deed was taken by the creditors as a substitute for adjudication, and was intended to have the same effect. All the judges expressly put their judgments on this ground (4), and Byles, J., says, "It is true there was no bankruptcy. But still there was a petitioning creditor; and the statute says that the assignees and trustees shall have all the rights of all the creditors, including the petitioning creditor." The point so explicitly referred to by Byles, J., is the leading point in the case, and not only shews that the decision does not lay down a governing rule for other cases, but indicates the inconvenience and incongruity which would follow from the adoption of such a principle as that for which the plaintiffs must contend. For in *Topping* v. *Keysell* (1), a point to which the title of the trustees could relate was fixed by the existence of a petitioning creditor; but in the present case (as in most cases of trust deeds) there is no petitioning creditor, and if relation is to take place at all it must extend to the time of the accruing of any debt existing at the date of the deed, that is, it must reach much farther back than it does in bankruptcy, where, though a fraudulent preference may be impeached if there existed at the time the debt of any creditor in the bankruptcy, yet the assignees' title cannot be carried back by relation beyond the debt of the petitioning creditor: *Ex parte Norton* (2); *Ex parte Birkett* (3); *Ward* v. *Clarke.* (4) The operation of the rules as to fraudulent preference is frequently oppressive even in bankruptcy, in defeating transactions which, though they may be technically termed fraudulent, are perfectly honest and bonâ fide, and are only made illegal by the subsequent bankruptcy; but if the doctrine which the plaintiffs maintain is sound, the operation of these rules will be much more harsh in the case of deeds. Coupling the doctrine of relation as applied to trust deeds with other powers and rights enjoyed by assignees in bankruptcy, and which by the same reasoning must be conferred on trustees, great difficulties would arise; amongst others, trustees would be entitled to claim goods in the order and disposition of the debtor at the date of any act of bankruptcy which was subsequent to the existence of any debt under the deed. But it is further doubtful whether the doctrine of fraudulent preference ought to be applied to this deed at all. The true view is, that the trustees only take that property which the deed, the contract between the debtor and his creditors, gives to them, and which was alone in their contemplation, and that is only the goods conveyed. And the same observation would apply to the doctrine of order

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(1) 16 C. B. (N.S.) 258; 33 L. J. (C.P.) 225. 10 Jur NS 774

(2) 16 C. B. (N.S.) at pp. 259, 264, 266. 10 Jur NS 774

(3) 16 C. B. (N.S.) at p. 266.

(4) 16 C. B. (N.S.) Erle, C.J. at pp. 280, 281; Willes, J. at p. 284; Byles, and Keating, JJ. at p. 287. 10 Jur N.S. 774, 777

(1) 16 C. B. (N.S.) 258; 33 L. J. (C.P.) 225. 10 Jur. NS 774.

(2) De G. 504, 528.

(3) 2 Rose, 71.

(4) M. & M. 497.

and disposition. It obviously cannot be intended that such powers shall apply to the trustees of all deeds executed under the Bankruptcy Act, 1861, as, for instance, deeds in which the debtor only covenants to pay a composition; yet it will be difficult to draw any line between deeds to which those doctrines are to be applied, and those to which they are not. The more simple course would be to make all the rights of the debtor at the date of the deed vest in the assignees, as they then are in the debtor. Nor have the Courts consistently applied the 197th section in the sense contended for by the plaintiffs; for a comparison of *Boyle* v. *Blackstock* (1), and *Young* v. *Roebuck* (2), shews the different position of an execution creditor in the case of a trust deed, and of a bankruptcy. Lastly, assuming trustees to be in the same position as assignees in bankruptcy, on an adjudication founded on a creditor's petition, yet there is authority to shew that even where a fraudulent preference is an act of bankruptcy, a demand is necessary: *Nixon* v. *Jenkins* (3); *Jones* v. *Fort.* (4)

[CHANNELL, B. *Nixon* v. *Jenkins* (3) was before the statute of 6 Geo. 4, c. 16, which, by s. 3, first made a transfer without deed an act of bankruptcy. *Jones* v. *Fort* (4) was immediately after that act.]

KELLY, C.B. The first question is, whether the transfer itself amounted to an act of bankruptcy—that is, whether it was sufficient to support a petition by one who was a creditor at the time of the act. And that depends on whether this was a fraudulent transfer of the goods and chattels of the insolvent. It is unnecessary to consider the law as it existed in the last century, or to refer further to the case of *Jones* v. *Fort* (4); for, first, the circumstances of that case were altogether different; and secondly, if it is to be treated as deciding that a fraudulent transfer of a bill by an insolvent cannot be an act of bankruptcy, the case is not law; and I should not hesitate to treat it as of no authority. The probability is, that the case having come before the Court of King's Bench shortly after the act was passed which made a fraudulent transfer without deed an act of bankruptcy, and the question not being expressly raised, it did not occur to the minds

(1) 8 L. T. (N.S.) 641.
(2) 2 H. & C. 296; 32 L. J. (Ex.) 260.
(3) 2 H. Bl. 135.
(4) 9 B. & C. 764.

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of either the counsel or the judges. There is, therefore, no authority to disprove, nor can I see any reasonable ground to doubt that a fraudulent transfer of goods and chattels, being expressly within the words both of the act of 6 Geo. 4, c. 16, and 12 & 13 Vict. c. 106, is an act of bankruptcy. Whether it is or is not also a fraudulent preference made in contemplation of bankruptcy, is immaterial; if it is a fraudulent transfer, it is an act of bankruptcy on which an adjudication might have been supported.

The remaining question is, whether trustees and assignees under a deed of this nature acquire, by virtue of s. 197 of the Bankruptcy Act, 1861, all the rights and powers of assignees in bankruptcy, i.e., whether the title of the assignees under such a deed has relation back, in the same way as the title of assignees on an adjudication in bankruptcy. That question is important, and we must see whether it has been decided. In *Topping* v. *Keysell* (1), there was a transfer and delivery of goods by the debtor to a creditor after the execution by him of a bill of sale of his whole stock in trade and effects, and with notice of that fact and the circumstances attending it. This was properly held to be a notice of an act of bankruptcy, and the question then arose, whether trustees to whom, by a deed afterwards executed under the Bankruptcy Act, 1861, the debtor, with the concurrence of the holder of the bill of sale, had assigned all his property, could, by virtue of the 197th section, avoid and override the transaction, and recover the goods so delivered. It is necessary to observe that it is not every trust deed under the act that would confer that power; but in *Topping* v. *Keysell* (1), as in the present case, the deed transferred the whole of the debtor's estate, and contained a clause by which the estate vested in the trustees was to be held by them on trust to apply the assets as in bankruptcy. In this state of things s. 197 was held expressly to enable the trustees to exercise all the rights and powers of assignees in bankruptcy. That case being directly in point as an authority, we are not called on to pronounce any opinion whether the rule there laid down ought to govern. But I do not hesitate to say that many sound reasons may be urged in its support. If no such power were possessed, there

(1) 16 C. B. (N.S.) 258; 33 L. J. (C.P.) 225. 10 Jur NS 774

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would be nothing to prevent a debtor from assigning secretly a large part of his estate to favoured creditors, or those who were no creditors at all, and so deprive real bonâ fide creditors of the whole benefit of the deed which he subsequently executed. It is obvious that the legislature intended by s. 197 to confer on such trustees powers large enough to enable them not only to obtain possession of the property conveyed, but to undo and set aside all previous transactions under which the property that ought to be distributed among the creditors generally was granted away in favour of one. But there is no other mode in which the assignee can effectually reach such property except by a resort to the doctrines of bankruptcy on this subject. I am, therefore, of opinion that the case in the Common Pleas was well decided, and on the authority of that case we are bound to hold that the assignees under this deed acquired all the powers in relation to the undoing of fraudulent transactions which are possessed by assignees in bankruptcy. Therefore this transfer being an act of bankruptcy, no change was effected in the property of the goods, and they remained in the insolvent, and passed to the plaintiffs under the deed of assignment. No injustice is done to the defendants who may now come in under the deed, and have their dividends, so as to be placed on the same footing as the other creditors in all respects.

MARTIN, B. I am of the same opinion. Two questions were argued by Mr. Holker; the first, whether the trustees under the deed of the 7th of September, were entitled by relation back to undo the transaction of the 4th of September; the second, whether if they could, a demand was necessary to enable them to recover. On the 4th of September an act was done which, if a fraudulent transfer, was an act of bankruptcy; and the jury have found that it was such. Therefore there can be no doubt that a creditor whose debt was sufficient to support a petition in bankruptcy, might have founded an adjudication on this act, and the assignee might therefore have maintained trover for the goods. And I may here dispose at once of the second point, because it is clear that if the transfer of the goods was an act of bankruptcy, the assignee would have a right to recover them back without any demand; and that, because the law considers that no transfer has been made by the bankrupt and that the dealing was a dealing not with the bankrupt's goods but with the goods of the assignee. If therefore the transfer was an act of bankruptcy, and the trustees can take advantage of it as such, there was no necessity for a demand. As to the first point I submit to the authority of *Topping* v. *Keysell* (1), but I do not see my way so clearly to agree with it as does the Chief Baron, and I think that much might have been said upon the other side. The case is in point to shew that on the execution of the deed of the 7th of September, assuming a sufficient creditor's debt to have existed at the time of the transaction, the deed had relation back so as to override the transaction of the 4th of September, and put the trustees in the same position as assignees in bankruptcy; and it is said by judges of great eminence that that is the clear construction of the act. I do not deny that it may be so, but one consequence is inevitable; that if in a deed under the act there be merely a covenant to pay a composition, the effect will be directly opposite to the intention, and the trustees will get the goods of which it was intended that the debtor should retain possession, and by the means of which he was to perform his covenant. Whether this would be so held, or whether common sense would be allowed to interfere, I will not venture to prophesy. I cannot however entirely concur with the Chief Baron in his approval of that decision. I will only add, that when a transaction of this kind has taken place, it is not a dishonest transaction; there is no reason why a creditor should not recover his debt, or why the debtor should not pay it; it may be void under the statute, but there is nothing in it dishonest or fraudulent. Up to the 7th of September the transaction here in question was a perfectly valid transaction and, but for the act of parliament, would have been rightly done. But according to *Topping* v. *Keysell* (1), on the 7th of September a new state of things arose, and this transaction became by the act of the debtor and by the operation of law, void.

CHANNELL, B. I am clearly of opinion that according to s. 67

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(1) 16 C. P. (N.S.) 258; 33 L. J. (C.P.) 225. 10 Jur ns 774

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of 12 & 13 Vict. c. 106, which is to the same effect as s. 3 of 6 Geo. 4, c. 16, this transaction was a fraudulent preference, and as such constituted an act of bankruptcy. It further seems to me that it is the duty of the Court to give effect to s. 197 of the Bankruptcy Act, 1861, by assimilating as far as possible the position of trustee to that of assignee in bankruptcy. I do not say this can be done in all cases, and the statute contemplates the reverse, for it says "as far as applicable." I agree with my Brother Martin, that when we speak of fraudulent preference, we do not mean by it anything involving or meriting blame; the term only signifies that the act is contrary to the declared and recognized policy of the bankrupt law. But I cannot think that the results he apprehends will follow from the application of *Topping* v. *Keysell* (1), or that we need apply to every deed the consequences attached by the Court of Common Pleas to the deed in that case. My Brother Willes, in his judgment, takes pains to point out that the same consequence would not be produced where there was no assignment of the debtor's estate and effects. (2) I think that case rightly decided, and that in deeds like the present one the doctrine of relation exists and applies. I cannot adopt Mr. Holker's view of the grounds of decision in that case, and that what was then said upon this point was said obiter; for it appears to me that the Court had the question in view, and distinctly applied their minds to its solution.

But, admitting the plaintiffs to be so far in the right, then another argument is presented to us, that trover is not maintainable because no demand of the goods has been made. But the decision of this point follows as a consequence from the decision on the previous one, for if the transaction was an act of bankruptcy then the doctrine of relation applies, and there is no occasion for a demand.

PIGOTT, B. I agree with the judgment and reasons of the Chief Baron, and quite approve of the case of *Topping* v. *Keysell.* (1) No doubt there are states of fact in which that decision would not apply to a trust deed under the Bankruptcy Act, 1861,

(1) 16 C. B. (N.S.) 258; 33 L. J. (C.P.) 225. 10 Jur. N.S. 774

(2) 16 C. B. (N.S.) at p. 286. 10 Jur N.S. 774

but we need not now speculate on that contingency; it will be sufficient to consider it when it presents itself.

Rule discharged.

Attorneys for plaintiffs: *Pritchard & Englefield, for J. Leigh, Manchester.*

Attorneys for defendants: *Reed & Co., for Sale & Co., Manchester.*

CLIMIE *v.* WOOD.

June 10.

Trade Fixtures—Mortgage—Rights of Mortgagor and Mortgagee.

Trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee.

Cullwick v. *Swindell* (Law Rep. 3 Eq. 249), followed.

Affd in Ex Ch 4 Ex 328

5QB137 – c
—8/6,
7CP332
8Ch1076
5ChD563

DETINUE for a steam-engine and boiler. Pleas: 1. Not guilty. 2. Not possessed. Issue thereon.

The plaintiff was the purchaser of the articles in question from the trustees under an inspectorship deed of one Daniel Climie. Daniel Climie had the freehold of two pieces of land, which may be called (as coloured on a plan produced at the trial) pink and green land, and upon them he, in the year 1864, erected an engine-house formed with brick pillars, partly open and partly enclosed, and with a slated roof. Into this building the engine was then put. It stood equally on each of the pieces of land. The boiler stood as to three-fifths, on the pink land, and as to two-fifths, on the green land.

The engine was screwed down to some thick planks which lay on the ground, and the boiler was fixed in brickwork. They were used for sawing timber in Climie's business of a contractor, and were clearly what are ordinarily called "trade fixtures."

In the year 1858 Climie mortgaged the pink land to Robert Craig in fee, and by him in July, 1866, it was sold (under a power) to a Mrs. Mumford. In January, 1865, he mortgaged the green land to Rock & Co. in fee.

In the same year, 1865, Climie executed the deed of inspectorship. In September, 1866, the engine and boiler were removed from the shed by the trustees of Climie at the request of Mrs. Mumford, who wanted them off the pink land. The plaintiff purchased them of the trustees about the same time. But while they were in the place to which the trustees had removed them they were sold by Messrs. Rock & Co., the mortgagees of the green land, to the defendant, who still detained them, and for this detention the present action was brought.

The cause was tried at the Middlesex sittings after Hilary Term last before Pigott, B., and the jury having found, in answer to questions put to them by the learned judge, first, that they were trade fixtures, and fixed for the better use of them, and not to improve the inheritance; secondly, that they were removable without any appreciable damage to the freehold; and, thirdly, that the sale to the plaintiff was bonâ fide; a verdict was entered for the plaintiff, with leave reserved to move to enter a verdict for the defendant on the ground that the property in the steam-engine and boiler did not remain in Climie, the mortgagor in possession.

A rule was obtained accordingly, against which

April 28. *Hon. G. Denman, Q.C.*, and *Simpson*, shewed cause. The engine and boiler are trade fixtures, and are not covered by the general words of a mortgage deed. They were actually severed from the land when sold, and during the time they were fixed, were found by the jury not to have been fixed for the improvement of the inheritance. If they had been, they would have passed with the freehold, but not otherwise: *Hellawell* v. *Eastwood.* (1) In *Walmsley* v. *Milne* (2) this is indicated as the true test.

[Martin, B. Where a mortgagor chooses to affix something to the land, not otherwise of a nature to pass with it, does not the maxim, quicquid plantatur solo, solo cedit, apply, and the creditor (mortgagee) get pro tanto a better security?]

Not necessarily. In *Waterfall* v. *Penistone* (3) it was held that machinery annexed to an estate did not pass to the mortgagee necessarily as part of the freehold. The question is one of fact in each particular case, whenever the articles are what Blackburn, J., in *Reg.* v. *Inhabitants of Lee* (1), calls "intermediate" things, i.e., not manifestly part of the premises, and the mere annexation of them to the freehold does not make them irrevocably the property of the freeholder: *Lancaster* v. *Eve* (2); *Fisher* v. *Dixon.* (3) In *Parsons* v. *Hind* (4) a hydraulic press fixed to the floor of a factory by bricks and mortar, for the more convenient carrying on of the works of the factory, was held to remain a chattel.

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(1) 6 Exch. 295.

(2) 7 C. B. (N.S.) 115; 29 L. J. (C.P.) 97. 6 Jur. N.S. 126,

(3) 6 E. & B. 876; 26 L. J. (Q.B.) 100. 3 Jur. N.S. 516

Channell, in support of the rule. Everything really and substantially fixed to the freehold is primâ facie a part of it, and it is only in cases where the fixedness is not of a substantial character that the purpose for which the articles are used becomes material: *Place* v. *Fagg.* (5) In this case the engine and boiler were fixed, and they do not the less pass with the freehold, because they were, in fact, "not to improve the inheritance," but only "for the better use of them." In *Cullwick* v. *Swindell* (6) trade fixtures affixed to freehold mortgaged premises, even after the mortgage, by the mortgagor in possession occupying the premises for the purpose of his trade, were held to pass to the mortgagee.

[KELLY, C.B. What claim can you make to the part of the articles which were on the pink land? That would seem either to have passed under the previous mortgage, and then to have re-vested in Climie or his trustees, or to have remained in him.]

The engine and boiler were removed off the pink land at the mortgagee's own request, but they were not given back to Climie or his trustees. Or even assuming that the plaintiff did obtain from the trustees the property in them, still he cannot maintain this action, for he is not as against the defendant, entitled to the entire chattel.

Cur. adv. vult.

June 10. The judgment of the Court (Kelly, C.B., Martin and Pigott, BB.) was delivered by

KELLY, C.B., who, after stating the facts as above, proceeded as follows:—It is clear that, as against a landlord, these articles would have been removable by a tenant. But Climie was not a tenant; he was a mortgagor in possession, for he had mortgaged one of the pieces of land to Mr. Craig in 1858, and the other piece to Messrs. Rock in 1865, and this was after the steam-engine and boiler had been erected. The question, therefore, is whether, as between mortgagor and mortgagee, trade fixtures are removable by the mortgagor.

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(1) Law Rep. 1 Q. B. at p. 253.

(2) 5 C. B. (N.S.) 717; 28 L. J. (C.P.) 235. 5 Jur NS 683,

(3) 12 Cl. & Fin. 312.

(4) 14 W. R. 860.

(5) 4 M. & R. 277.

(6) Law Rep. 3 Eq. 249.

The term "fixture" is an ambiguous one. It has been defined to be such an annexation as can be removed from land by the party annexing it adversely to the owner, but in its more general sense it means any annexation or addition which has been affixed to or planted in the soil of the land. The rule of the law is "Quicquid plantatur solo, solo cedit" (Broom's Maxims, p. 295), and in several of the old books the word "fixatur" is used as synonymous with "plantatur." This rule, however, has been relaxed; and whatever the authority may have been for the relaxation, there now exist a variety of authorities binding upon all courts, prescribing the law as to fixtures between the heir and the executor, between the tenant for life, or in tail, and the remainder-man, or the reversioner, and between landlord and tenant; and were this case one between landlord and tenant, there is no doubt whatever but that the tenant could lawfully remove the steam-engine and boiler in question. But, as already said, it is a case between mortgagor and mortgagee, and no authority has been cited to shew that a mortgagor is entitled to remove such trade fixtures. There have been several cases where the courts have decided that, upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to shew that such right exists without a special provision. A mortgage is a security or pledge for a debt, and it is not unreasonable if a fixture be annexed to land at the time of a mortgage, or if the mortgagor in possession afterward annexes a fixture to it, that the fixtures shall be deemed an additional security for the debt whether it be a trade fixture or a fixture of any other kind. It has already been observed that no authority has been cited to shew that trade fixtures may be removed by the mortgagor, but there are several to the contrary; and unless we are prepared to overrule them, our judgment must be adverse to the plaintiff. It is unnecessary to refer to cases earlier than *Ex parte Cotton.* (1) The case was decided in the Court of Review in Bankruptcy. A brewery had been mortgaged, and afterwards new and additional trade fixtures had been erected by the mortgagor. He became bankrupt, and the mortgagee was held entitled to the new fixtures against the assignee; and Sir John Cross, in delivering judgment, said: "By the general rule of law, fixtures belong to the premises to which they are affixed, as between mortgagor and mortgagee, without any such distinction as that of tenant's fixtures." The case of *Mather* v. *Fraser* (2) was decided by Lord Justice Page Wood when Vice-Chancellor, and two of the fixtures then in question were a steam-engine and boiler fixed to the land. It was contended that these articles were similar to those in *Hellawell* v. *Eastwood* (3), where mules used for spinning cotton, fixed by means of screws into the floor, and secured by molten lead, were held personal chattels, and distrainable for rent; but the Vice-Chancellor decided that a steam-engine and boiler fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil, and would pass to a purchaser or mortgagee by a conveyance of the soil as part of the soil itself.

This case, if it be law, is conclusive in favour of the defendant, for Climie, when owner of the freehold, annexed the steam-engine and boiler to the land, and afterwards conveyed the land to the mortgagee by the ordinary form of mortgage, and no provision is to be found indicating any intention that they should be excepted. This case was followed by *Walmsley* v. *Milne* (4), where the judgment of the Vice-Chancellor was approved of and upheld. Two of the fixtures there were also a steam-engine and boiler, and the Court intimated that they took the same view of *Hellawell* v. *Eastwood* (3) as the Vice-Chancellor, viz., that such articles, when annexed to land, were fixtures, and partook of the nature of the soil. This case seems also in point in favour of the defendant. The case of *Cullwick* v. *Swindell* (5) was decided in 1866 by Lord

(1) 2 M. D. & De G. 725.

(2) 2 K. & J. 536. 2 Jur. N.S. 900

(3) 6 Ex. 295.

(4) 7 C. B. (N.S.) 115; 29 L. J. (C.P.) 97. 6 Jur. N.S. 1126.

(5) Law Rep. 3 Eq. 249.

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Romilly. He stated that he would follow *Ex parte Cotton* (1), and hold that fixtures, although trade fixtures, and put up for the purpose of carrying on the business, and although put up since the date of the mortgage, so far as they are affixed to the freehold, go with it to the mortgagee. This is a stronger case than the present, for here the trade fixtures were upon the freehold at the time of the mortgage, and all the authorities seem to shew that they pass with the land. The result is that the old maxim of "Quicquid plantatur solo, solo cedit," applies in all its integrity to the relation of mortgagor and mortgagee, and that trade fixtures constitute no exception. It follows from this that the findings of the jury, that the steam-engine and boiler were fixed by the mortgagor for their better use, and not to improve the inheritance, and that they could be removed without any appreciable damage to the freehold, become immaterial, for the right of the mortgagee attaching by reason of the annexation to the land, the intention of the mortgagor in respect of them cannot prevail against the legal effect of the deed.

The argument on behalf of the plaintiff in shewing cause against the rule was confined to the general question, but in supporting it Mr. Channell's attention was called to the fact that Messrs. Rock were only entitled to the part of the fixtures which was attached to their land. His answer was satisfactory, that, assuming the plaintiff to be owner of the one-half or three-fifths of these articles, he could not maintain detinue for the whole, but that to entitle the plaintiff to maintain detinue he must, as against the defendant, be entitled to the possession of the entire chattel.

We think, therefore, that the rule must be made absolute, but we must not be supposed to imply that the defendant acquired any title to the whole under the sale to him by the mortgagees, who were themselves entitled to a part interest only in the articles in question.

Rule absolute.

Attorney for plaintiff: *Leefe.*

Attorneys for defendant: *Chester & Urquhart.*

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(1) 2 M. D. & De G. 725.

LORD FOLEY AND OTHERS, TRUSTEES, *v.* THE COMMISSIONERS OF INLAND REVENUE.

1868
June 8.

4 Ex 328

Stamp—Mortgage—Transfer to New Trustees—Several Deeds.

The 13 & 14 Vict. c. 97, Sch. Tit. "Mortgage," imposes on the transfer of a mortgage exceeding 1400*l.* a fixed duty of 1*l.* 15*s.* The 24 & 25 Vict. c. 91, s. 30, enacts that where there are *several deeds* on the transfer of a mortgage from old to new trustees, if one of the deeds be stamped with the duty of 1*l.* 15*s.*, it shall be sufficient that the others are stamped with the duty by law chargeable on a duplicate or counterpart, viz., 5*s.* The 28 & 29 Vict. c. 96, s. 17, after reciting that certain duties were imposed on transfers of mortgages by the 13 & 14 Vict. c. 97, enacts that in lieu thereof there shall be charged and paid on every such transfer for every 100*l.* of the amount or value of the principal money or stock already secured by such mortgage thereby transferred, or fractional part of 100*l.*, the duty of 6*d.*:—

Held, that provisions of the 24 & 25 Vict. c. 91, s. 30, were not repealed by the general enactment contained in the 28 & 29 Vict. c. 96, s. 17, and therefore that trustees were still entitled to the privileges afforded under that section.

CASE stated by the Commissioners of Inland Revenue, pursuant to the 13 & 14 Vict. c. 97, at the request of Lord Foley and others, in order that they might appeal against the commissioners' determination as to the stamp duties chargeable on the indentures hereinafter mentioned.

By an indenture of settlement, dated the 14th of July, 1849, between Lord Foley of the first part, the Dowager Lady Foley of the second part, George Rowley of the third part, the Duke of Norfolk and Lady Mary Howard (now Lady Mary Foley) of the fourth part, Earl Grosvenor and Viscount Brockley of the fifth part, G. Capron and T. G. Curtler of the sixth part, and Lord Arundel and Surrey, Lord Edward Howard, the Hon. A. J. Ashley, and John H. Hodgetts Foley of the seventh part (being the settlement on the marriage of Lord Foley with Lady Mary Howard), after reciting several deeds by which arrangements were made for carrying out the sale to Earl Dudley of Lord Foley's Whitby estates, and an agreement by Lord Foley to settle a specified part of the purchase-money then remaining unpaid by Earl Dudley, and also a further sum due from another person on mortgage of the Thurles estate in Ireland; and after also reciting certain other deeds whereby the said sums were vested in the parties thereto of the seventh part, as trustees of the said settlement, it was witnessed that the said trustees should stand possessed of the said sums upon certain trusts in the said indenture mentioned.

By an indenture indorsed on the indenture of settlement, dated the 7th day of November, 1867, Augustus Foley, St. George Foley, and Arthur Kinnaird, were appointed new trustees in place of Lord Arundel and Surrey, A. J. Ashley, and J. H. H. Foley, deceased, and it was thereby declared that they (in conjunction with Lord Edward Howard) should stand possessed of all the trust property when the same should be transferred to them. The indenture contained recitals that the specified part of the purchase-money which was to be received from Earl Dudley had been paid to the trustees, as well as a portion of the other sum secured on the Thurles estate, and that the trust funds then consisted of the mortgage debts and stock mentioned in the schedule thereto. Among the debts mentioned in the schedule was one of 20,000*l.* secured on property in Leicestershire, and another of 15,000*l.* secured on property in Cumberland. These debts were transferred to the new trustees by separate indentures both dated the 8th of November, 1867.

The indenture of appointment of new trustees was duly stamped with the duty of 35*s.*

On the 7th of March, 1868, Lord Foley and the new trustees presented the two indentures of transfer, which had been previously stamped as to the transfer of the mortgage for 20,000*l.* with the duty of 35*s.*, and as to that of the mortgage for 15,000*l.* with the duty of 5*s.*, to the Commissioners of Inland Revenue, under the provisions of the 13 & 14 Vict. c. 97, s. 14, and desired their opinion as to what were the proper stamp duties payable. The commissioners were of opinion that the transfer of the mortgage for 20,000*l.* was liable to the stamp duty of 5*l.*, and the transfer of the mortgage for 15,000*l.* to the stamp duty of 3*l.* 15*s.*, and assessed and charged the said duties accordingly. These sums were then paid, but Lord Foley and the trustees not being satisfied with the commissioners' decision, required them to state this case. The question for the Court was, with what stamp duty the said two indentures of transfer were, under the circumstances above mentioned, respectively chargeable.

The 13 & 14 Vict. c. 97, Sch. Tit. Mortgage, imposes a duty of 1*l.* 15*s.* on any transfer or assignment of any mortgage, or of the money or stock thereby secured, when no further sum shall be added to the principal money or stock already secured, if such principal money or stock shall exceed in amount or value in the whole the sum of 1400*l.*

The 24 & 25 Vict. c. 91, s. 30, enacts that where upon the appointment of a new trustee the property which is the subject of one and the same settlement, or of trusts created for the benefit of the same parties, is of various kinds or descriptions, or is held under different titles, and it is necessary or desirable that it should be conveyed to or vested in the trustee by means of several deeds or instruments, or where, upon any such appointment, several deeds or instruments are made or executed for the purpose only of transferring to and vesting in the trustee the same trust property, if in any of such cases one of the deeds or instruments shall be stamped with the duty of 1*l.* 15*s.*, it shall be sufficient if the others or other shall be stamped with the duty that would by law be chargeable on a duplicate or counterpart thereof, and on all the deeds or instruments being produced duly stamped accordingly it shall be lawful for the Commissioners of Inland Revenue, on being satisfied as to the facts, to impress the deeds or instruments not having the duty of 1*l.* 15*s.* thereon with a particular stamp, to denote the payment of such duty on some other instrument.

By 13 & 14 Vict. c. 97, Sch. Tit. Duplicate, and 24 & 25 Vict. c. 91, s. 31, the stamp duty on a duplicate is 5*s.* when the duty on the original (exclusive of progressive duty) amounts to 5*s.* or upwards.

The 28 & 29 Vict. c. 96, s. 17, after reciting that by the 13 & 14 Vict. c. 97, certain stamp duties specified in the schedule to the same act were granted and imposed upon any transfer or assignment of any mortgage, or of the money or stock thereby secured, enacted that "in lieu of the said last-mentioned duties there shall be charged and paid on every such transfer or assignment as aforesaid, the following duties, that is to say: for every 100*l.*, or fractional part of 100*l.*, of the amount or value of the principal money so transferred or assigned, the duty of 6*d*."

May 7. *Keane, Q.C.* (*Liebstein* with him), for the appellants. The 24 & 25 Vict. c. 91, s. 30, is not repealed by the 28 & 29 Vict. c. 96, expressly or by implication: *Williams* v. *Pritchard.* (1)

[Bramwell, B. The 13 & 14 Vict. c. 97, imposed certain duties on transfers of mortgages. The second act gave an exceptional privilege in certain cases, viz., where, on the appointment of new trustees, several deeds were executed for the purpose of transferring various mortgage debts to them. Then came the third act, imposing new duties "in lieu of" these imposed by the first-mentioned act. The argument for the Crown will be that this last enactment is general, and that the exceptional privilege is impliedly repealed.]

All that the later act does is to change the scale of duties. The 24 & 25 Vict. c. 91, s. 30, says that "it shall be sufficient" in the cases therein mentioned, if one deed is stamped with a 1*l.* 15*s.* stamp, that the rest should be stamped as duplicates. There is nothing in the 28 & 29 Vict. c. 96, to affect the force of these words. The legislature, if there had been an intention to repeal the section, would have done so expressly, as was done by the same act, s. 12, with reference to the immediately preceding section (29) of 24 & 25 Vict. c. 91. [He was stopped.]

Sir J. B. Karslake, Q.C. (*A.G.*), (*Sir W. B. Brett, Q.C.* (*S.G.*), and *Crompton Hutton* with him), for the Crown. The second act was passed at a time when 1*l.* 15*s.* was the maximum duty payable on a deed of transfer of a mortgage, to give relief to trustees in cases where, from motives of convenience, more deeds than one were made use of. The maximum was retained for one deed only—the rest were chargeable at a lower rate. Then, by the third-mentioned act, an entire change was made. An ad valorem duty was substituted for the 1*l.* 15*s.* duty in all cases, whether the transfer be effected by one deed or by several. The result of the appellants' contention would be, that trustees who would have to pay an ad valorem duty if the transfer to them of several trust funds were effected by one deed would be able to escape so doing, and to pay only a 1*l.* 15*s.* stamp, and some minor duties, by the contrivance of having more than one deed of transfer executed. They would thus pay a less duty than any one else on a transfer, whereas the intention of the legislature was not to relieve them from paying the maximum, but to relieve them from paying it more than once.

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(1) 4 T. R. 2.

Keane, Q.C., was heard in reply, and *Sir J. B. Karslake, Q.C.* (*A. G.*), in rejoinder.

Cur. adv. vult.

June 8. The judgment of the Court (Kelly, C.B., Martin and Bramwell, BB.), was delivered by

KELLY, C.B. In Lord Foley's settlement, property, the subject of the settlement, consists of several mortgages, and there has been an appointment of new trustees, and several deeds have been executed for the sole purpose of vesting in the new trustees these mortgages; and the question is, what are the proper stamps to be affixed upon the deeds of transfer in such a case? Lord Foley and his trustees allege that the duty is imposed by the 24 & 25 Vict. c. 91, s. 30, and that that act provides that one of these deeds should be stamped with a duty of 1*l.* 15*s.*, and the other with the duty upon a duplicate or counterpart, viz., 5*s.* On the other hand, the Commissioners of Inland Revenue insist that the duty to be charged is imposed by the 28 & 29 Vict. c. 96, s. 17, being 6*d.* upon every 100*l.* of the principal money secured. The 13 & 14 Vict. c. 97, Sch. Tit. Mortgage, imposed upon the transfer of a mortgage which shall not exceed 1400*l.* the same duty as on an original mortgage, and upon a transfer above 1400*l.* a fixed duty of 1*l.* 15*s.* The 24 & 25 Vict. c. 91, s. 30, alters this as regards cases like the present, and enacts that where there are several deeds upon the transfer of a mortgage from old to new trustees, if one of the deeds be stamped with the duty of 1*l.* 15*s.*, it shall be sufficient that the others are stamped with the duty by law chargeable on a duplicate or counterpart, viz., 5*s.* The question is whether this section be repealed by 28 & 29 Vict. c. 96, s. 17. This is an act to amend the laws relating to the inland revenue, and contains a variety of provisions with respect to different subjects of stamp duty; and by the 12th section, the 29th section of 24 & 25 Vict. c. 91, is expressly repealed, but the 30th section is not mentioned or referred to.

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The 17th section recites that by the 13 & 14 Vict. c. 97, certain duties were imposed upon transfers of mortgages, and it enacts that in lieu of the last-mentioned duties, there shall be charged upon such transfers the duty of 6*d.* upon every 100*l.*, or fractional part of 100*l.* transferred, and it is contended that this repeals the 30th section of the 24 & 25 Vict. c. 91. We think that it does not. In the first place, it does not expressly repeal it, whilst the Act does expressly repeal the next preceding section, viz., the 29th; and if the legislature meant (in the sense in which this expression is used in reference to the subject) to repeal it, it is difficult to see why they should not have done so in express words. Then, is it repealed by implication? We think not; and, on the contrary, it seems that the reasonable and natural construction of the 17th section is to substitute it for the enactment in the schedule of the 13 & 14 Vict. c. 97, leaving the relief given by the 30th section of the 24 & 25 Vict. c. 91, in the peculiar case therein provided for intact. There is nothing of necessary implication from the 17th section of the 28 & 29 Vict. c. 96, inconsistent with or repugnant to the 30th section of the 24 & 25 Vict. c. 91. These two sections may as well subsist together as the 30th section with the original enactment in the 13 & 14 Vict. c. 97. It is said, and with truth, that incongruous consequences may arise if these two sections still subsist, viz., that if a mortgage debt of 20,000*l.* be secured by one deed, the transfer of it would require a 5*l.* stamp; whilst if it be secured by two deeds, the duty would be 2*l.* only. We think, however, that acts of parliament imposing stamp duties ought to be construed according to the plain and ordinary meaning of the words used as it appears from the words themselves, and that such an incongruity as this does not authorize a court of law to adopt a strained and forced construction in order to avoid it. In our judgment, it is better both for the state and the subject that the ordinary rule of construction should be applied, and that the error or mistake, if it be a mistake, should be rectified by the legislature.

Judgment for the appellants.

Attorneys for appellants: *Capron, Dalton, & Hitchins.*
Attorney for respondents: *The Solicitor to the Inland Revenue.*

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Ship—Shipping—Mortgage—Freight—Interpleader—Equitable Right—Assignees in Bankruptcy.

14 Eq 357
41,
7 Ch 509
10 CP 558
652-4

A mortgage of a vessel carries with it the freight, and the mortgagee intervening by taking possession, or by an act equivalent to taking possession, before the freight becomes payable, is entitled as against the mortgagor, or his assignees in bankruptcy, to receive it.

The owners of a ship having mortgaged it to the plaintiff, chartered it to S. and D., for a voyage to Brass River, two-thirds of the freight being payable five days after sailing from Liverpool, the remaining one-third on receipt of the captain's advice of delivery at Brass River. The plaintiff demanded the two-thirds freight from the owners, both before and after it was payable, but did not obtain it. After the complete discharge of the vessel at Brass River, but before receipt of the captain's advice of delivery, the plaintiff gave notice of his mortgage to the charterers, and on the return of the vessel to Liverpool took possession of her outside the port.

Held (Bramwell, B., dissentiente), that although the mortgagee could not sue upon the charterparty, yet he was by virtue of his mortgage entitled as against the owners to claim and to receive the freight; that his right to receive the freight might be perfected by his taking possession, or doing an act equivalent to taking possession, at any time before the freight was payable, although after it had been actually earned; that actual possession being impossible, notice to the mortgagors and to the charterers was an act equivalent to taking possession, and that the plaintiff having done all that was possible to manifest his right, was entitled to be paid the freight.

In an action for freight brought by the mortgagee of a ship against charterers under the mortgagors after the mortgage, the charterers interpleaded and paid the freight into Court; and an interpleader issue was directed between the plaintiff and the assignee in bankruptcy of the mortgagors. On this issue a special case was stated, concluding with the question whether the plaintiff was entitled as against the defendant to the sum in Court.

Held (Bramwell, B., dissentiente), that the Court would in this special case consider the equitable rights of the parties; and that as the plaintiff was equitably entitled to the freight as against the owners, and the defendant, as assignee in bankruptcy of the owners, could only take that to which the owners were equitably as well as legally entitled, the plaintiff was entitled to recover.

Special case stated in an interpleader issue directed in an action for freight. The action was brought by the plaintiff, a mortgagee of the *Inanda*, against Stuart and Douglas, for freight due under their charterparty, which was also claimed by the creditors' assignee of the mortgagors. The charterers paid the money into Court, and an interpleader issue was directed between the mortgagee and the creditors' assignee.

The issue came on for trial before Mellor, J., at the Liverpool spring assizes, 1868, and a verdict was entered for the plaintiff, subject to the opinion of the Court on a special case, which stated as follows:

The *Inanda*, owned by Santos and Evans, was mortgaged by them to the plaintiff on the 20th of February, 1867, to secure 1000*l.*; the money being made payable on the 20th of August then next, before which time the power of sale was not to be exercised. In the mortgage no mention was made of freight. On the 14th of March, 1867, she was again mortgaged to the plaintiff to secure a further sum of 1000*l.*, the money being made payable on the 13th of March, 1868, and no mention being made of freight.

On the 1st of March, 1867, the *Inanda* sailed from Liverpool for the Brass River, under a charter to Stuart and Douglas, which made the freight payable "two-thirds in cash, or bill at three months at charterers' option, less 5 per cent. for all charges, five days after the vessel sailing from Liverpool, and the remainder on the true delivery of the cargo (less advances as per captain's receipt) in cash on receipt of captain's advice of delivery."

After the vessel had sailed from Liverpool, but before the two-thirds freight had become payable, the plaintiff applied for it to Santos and Evans, but was informed that it had not been paid.

On the 1st of April, after the two-thirds freight had been paid, the plaintiff again applied for it to Santos and Evans; they did not pay it over to him.

On the 24th of May, the plaintiff gave notice of his mortgage to Stuart and Douglas, and claimed the balance of the freight.

The *Inanda* arrived at Brass River on the 1st of May, and was discharged on the 18th; and on the 3rd of July, advice of the delivery of the cargo was received by the owners from the captain, and by Stuart and Douglas from their agents. The *Inanda* sailed for Cape Town and thence to Mauritius in search of a cargo, and having at the latter place obtained a cargo, returned to Liverpool, and was taken possession of by the plaintiff outside the port on the 18th of January, 1868.

On the 22nd of June, 1867, Santos and Evans were adjudicated bankrupts, and the defendant was appointed creditors' assignee. On the 17th of July, the plaintiff demanded the balance of the freight from Stuart and Douglas.

The Court was to be at liberty to draw inferences of fact, and the question stated for their opinion was, whether the plaintiff was entitled as against the defendant to the sum paid into Court.

Holker, Q.C. (*Herschell* with him), for the plaintiff. By the mortgage of the vessel the freight was assigned as an incident; and although whilst the mortgagee permits the mortgagor to remain in possession of the ship, payment to the mortgagor is good, yet as soon as the mortgagee intervenes, he becomes entitled to receive the freight. But in addition to this, the defendant is assignee in bankruptcy of the owners, and can take only what they are equitably entitled to, therefore as between him and the mortgagee the latter is clearly entitled.

The Court called upon

R. G. Williams (*Higgin, Q.C.*, with him), for the defendant. The mortgage is merely a mortgage under the Merchant Shipping Act, 1854, s. 66, making no mention of the freight, and by such a mortgage the freight does not pass to the mortgagee. He may take possession of the ship, and if he does so while she is still earning freight he may be entitled to the freight, but that is because in that case the ship is his ship whilst the freight is being earned; but until possession is taken he is not in the position of owner. That to entitle the mortgagee to freight the ship must be earning freight whilst he is in possession, is clearly shewn by *Chinnery* v. *Blackburne* (1), and *Gardner* v. *Cazenove* (2), especially by the judgments of the Chief Baron and Bramwell, B., in the latter case. (3) The distinction between the case of a sale and a mortgage is pointed out by Erle, C.J., in *Willis* v. *Palmer*. (4) On the sale of a ship the freight passes as appertaining to the ship, but in a mortgage in the usual form, that is, where no special mention is made of freight, it is presumed that it was not intended that the mortgagee should take it. And again the reason of this distinction is there stated in the same way as in *Chinnery*

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(1) 1 H. Bl. 117, n.

(2) 1 H. & N. 423; 26 L. J. (Ex.) 17.

(3) 1 H. & N. at pp. 435, 436; 26 L. J. (Ex.) at pp. 19, 20.

(4) 7 C. B. (N.S.) 340, at p. 358; 29 L. J. (C.P.) 194, 200. 6 Jur. N.S. 732-6

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v. *Blackburne* (1), namely, that as the mortgagor bears the expense of the voyage, it is thought reasonable he should have the profits. Here the mortgage was prior to the sailing of the vessel, and the mortgagee might, if he pleased, have taken possession of it before it started; and it would then have worked at his risk and cost, and worked for him. But if he did not choose to do so, he must take the consequences if he was afterwards unable to take possession, and so entitle himself to freight before the freight was earned; for the mere giving of notice was not taking possession. The distinction between an owner and a mortgagee is recognized by the Merchant Shipping Act, 1854, s. 70.

[MARTIN, B. That is only for certain purposes. The clause was introduced at a time when a notion prevailed (which is now exploded), (2) that liabilities for necessaries followed the ownership of the vessel.]

Further, the plaintiff could certainly not have maintained an action against the charterers, for a charterparty is a personal contract and does not pass to the assignee of the ship: *Splidt* v. *Bowles.* (3) But this issue, which is directed in such an action, cannot entitle the plaintiff to any rights he would not have had in the original action; the question is one at common law, and the plaintiff, therefore, cannot recover.

Holker, Q.C., in reply. The special case would be idle if it had not been intended to try the real rights of the parties to it. In every case of interpleader it is assumed that the interpleading party is liable to one of the claimants, and is not liable to the other; and he may be liable to one at law, to the other in equity, so that he might either be compelled to pay over again if he paid, after notice, to one legally but not beneficially entitled, or at least might, before payment, be liable to be restrained by an equitable injunction from so paying. When, therefore, an interpleader order is made, the whole question between the claimants is raised, and their equitable as well as their legal rights are to be determined. Otherwise the only effect of the decision on the one point would be to drive them into equity on the other. But the plaintiff's right may be put higher; for the defendant being an assignee in bankruptcy of the owners, can take only what the bankrupts were equitably as well as legally entitled to, and cannot even at law recover for more. (1) If the plaintiff cannot recover, no one can. Again, if this money had been paid over to the defendant, the plaintiff would have been entitled to recover it as money received to his use.

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(1) 1 H. Bl. at p. 118, n.

(2) See *The Troubadour*, Law Rep. 1 Ad. 302; *Mitcheson* v. *Oliver*, 5 E. & B. 419; 25 L. J. (Q.B.) 39. [illegible] 190

(3) 10 East, 279.

Upon the substantial question between the parties, neither of the answers given by the defendant to the plaintiff's claim is sound. The argument that as the mortgagor has borne the cost and risk he ought to have the profits, is a very halting argument; for it is admitted that if the mortgagee takes possession at any time when the ship is still earning freight he is entitled to recover the freight, and *Cato* v. *Irving* (2) shews that he may so entitle himself by taking possession at any time before the freight is payable, although the voyage is concluded and the ship actually in the docks. The same reasoning disposes of the argument that the ship must be working for the mortgagor, for in *Cato* v. *Irving* the whole of the ship's service was completed, and all that remained was the lien on the goods, which would have attached as much in a warehouse as in the ship. This principle has been carried still further in *Brown* v. *Tanner* (3), in which the Lords Justices, after taking time to consider, reversed the decision of the Court below (4), holding that the mortgagee could still claim freight, although the greater part of the cargo had been actually delivered before he took possession. Moreover, the rule contended for by the plaintiff is contrary to the analogy of mortgages of real property, where it is quite immaterial whether the land is still rendering any service when the mortgagee takes possession; and rent already accrued due, and crops on the ground whether ripening or rotting, become his property. But taking possession does not mean taking manual possession, the only ground for which opinion would be the erroneous assumption that the ship must be working for the mortgagor. In the judgment of Erle, C.J., in *Willis* v. *Palmer* (1), it is said to be presumed that the mortgagor in possession is intended to take the profits "till the mortgagee intervenes"; the intervention of the mortgagee, therefore, is the only material thing, and this intervention may take place in various ways, of which taking possession is one. If possession cannot be taken, notice is sufficient; and in the present case the utmost that could have been done by the plaintiff to signify his intention and assert his claim, has been done in fact: *Morrison* v. *Parsons* (2) shews that payment to the mortgagee is a good answer at law to the mortgagor suing on the charterparty. *Dean* v. *McGhie* (3) decides the same with respect to the agent of the mortgagor retaining, on the demand of the mortgagee and on his behalf, freight paid to himself under a charter with the mortgagor in possession; and the judgments of Best, C.J., and Gaselee, J., directly answer the arguments raised on 6 Geo. 4, c. 110, s. 45, which, like 17 & 18 Vict. c. 104, s. 70, declares the mortgagee not to be owner: *Kerswill* v. *Bishop* (4) is to the same effect.

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(1) See *Young* v. *Matthews*, Law Rep. 2 C. P. 127, per Erle, C.J., at p. 129.

(2) 5 De G. & S. 210, at pp. 224, 225.

(3) Law Rep. 3 Ch 597 (~~not yet reported~~). See post, p. 275. (1)

(4) Law Rep. 2 Eq. 806.

BRAMWELL, B. I am of opinion that the defendant is entitled to our judgment. On the merits of the case I abide by what I said in *Gardner* v. *Cazenove* (5), that to entitle the mortgagee to freight, the ship must have been working for him, it must have been earning freight whilst he was in possession; I do not say physical, manual possession, but such possession for instance, as may be constituted by giving notice to the charterer, while something remains to be done by the ship to make the freight payable. Merely coming to the mortgagor, and demanding that the freight be paid to him can make no difference; it only means, "as I have lent you my money, in reason and justice you should pay me what you are gaining." And I may further observe that by the terms of this mortgage the money was not payable till August, so that there was no default till that time. Every consideration corroborates this view, and especially the observation of Lord Lyndhurst in the case of *Kerswill* v. *Bishop*, as reported in Tyrrwhit (6), "In *Chinnery* v. *Blackburne* (7), possession was not taken by the mortgagee till after the voyage was completed; and it was held that freight earned in that voyage, though after the mortgage, could not be recovered by the mortgagee." This shows the ground of his decision in that case, namely, that the freight was there *earned* after possession was taken. Again, the case of *Brown* v. *Tanner* (1) ought rather to have been cited for the defendant than for the plaintiff, for the judgment of the Lords Justices expressly puts their decision on the ground that the freight was not fully earned, that it was not due, when the mortgagee took possession.

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(1) 7 C. B. (N.S.) 340, 358; 29 L. J. (C.P.) 194, 200. 6 Jur Ns 732-6,

(2) 2 Taunt. 407.

(3) 4 Bing. 45.

(4) 2 C. & J. 529.

(5) 1 H. & N. 423, 436; 26 L. J. (Ex.) 17, 20.

(6) 2 Tyrw. at p. 610.

(7) 1 H. Bl. 117, n.

Every consideration then, both of reason and authority, corroborates this view. Freight is due by contract as the payment of something done; and the case is not like that of *Pope* v. *Biggs* (2), where it was decided that a mortgagee entering into possession may demand rent due before he entered. That decision is a strong one, but it may be put upon the ground suggested by Parke, J. (3), that the rent might be got by the way of an action of trespass and for mesne profits; and this is sufficient to distinguish the case from the present one, for there is no ground for saying that the mortgagee could have maintained any action whatever for this freight.

But on the other ground also, it is clear that judgment must be

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597// (1) Law Rep. 3 Ch. (~~not yet reported~~). The question there arose between the assignee of a charterparty freight and mortgagees of the ship prior to the charterparty. Lord Justice Wood, in delivering the judgment of the Court of Appeal, said: "It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken. . . . . The only question then really is, had the freight become due when the appellants (the mortgagees) took possession? . . . On principle we conceive that the freight cannot be due from the charterers on a charterparty, such as the present, until they have had the full user of the ship for the purposes for which they chartered it. It is, in fact, analogous to the demise of property until a given purpose is answered, the purpose in the case being, first, the outward voyage, second, the taking in of a complete cargo at such profit freight as the charterers may be able to obtain above the freight they have agreed to pay to the owners, and, third, the delivery of the cargo to the consignees by the charterers. The freight is expressly payable (under the charterparty) on 'unloading and right delivery of the cargo as customary,' and the freight is to be collected by the charterers."(3Ch 602)

(2) 9 B. & C. 245.

(3) 9 B. & C. at p. 257.

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for the defendant. The plaintiff brought an action against the charterers. The charterers have not troubled themselves to defend that action, but take out an interpleader summons, and obtain an order for an interpleader issue. That issue is to be tried at common law, and the question must be a common law question, otherwise the preposterous consequence would follow that in an action for trespass the defendant might say he has no interest, and obtain an order for an issue in which the plaintiff might be at liberty to contend that he is entitled in equity to the land in question. The question is, whether the plaintiff is entitled to sue any one in a court of common law, and it is clear that he is not, and must have been nonsuited. Then the addition of the claimant as a party cannot alter his position. It is said the question stated for our opinion is, whether the plaintiff is entitled as against the defendant, but that cannot entitle the plaintiff to our judgment when he has no common law right whatever to succeed upon. He is not entitled as against the defendant, because he has no right against any one. I think, therefore, that our judgment ought to be for the defendant.

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MARTIN, B. There is a substantial and a formal question in this case. The substantial question is, who is entitled to receive the freight under this charterparty. Now it has been held for many years, and frequently decided, that the effect of a mortgage of a ship, under a contract for earning freight, is to transfer the freight to the mortgagee. The freight becomes his property as a chose in action, and the case of *Kerswill* v. *Bishop* (1) is a direct decision to this effect. But, in analogy to the case of real property, it is rightly held that though the mortgagee takes the accruing freight as his property, yet payment to the mortgagor is good payment. If, however, the mortgagee intervenes at any time before payment, he has a right to do so; he asks for his own property. What entitles him to receive the freight is the communication of the fact that he is mortgagee, and that he claims it as such; and taking possession is only one mode of communicating the fact. I entirely dissent from the proposition that he is entitled because he does any act in earning the freight; for he usually does nothing, and it has been

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(1) 2 C. & J. 529.

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frequently pointed out that his right depends not on contract, but on property. I think the law on this point is beyond doubt.

I am also of opinion that the plaintiff is entitled to succeed upon another ground. The defendant is assignee in bankruptcy of the owners of the ship; and it is established law that assignees take only that to which the bankrupt was equitably entitled. Now, at all events, the plaintiff has an equitable right, for the effect of the mortgage was to assign the freight to him, and therefore it did not pass to the assignee.

The other question is a formal one; whether the plaintiff is to be driven into equity to establish his right? I agree that he could not maintain an action; but the money is in court, and the question is, who is lawfully and equitably entitled to receive it? And this question I will not refuse to try when it is submitted to us for decision.

CHANNELL, B. I am of the same opinion. I cannot agree with my Brother Bramwell that we are not to try the substantial question between the parties, and that the only question we can determine is, whether the plaintiff is entitled to maintain an action. The charterer, claiming no right in the freight, had a clear right to interplead in equity, and it would be a very narrow view of the interpleader acts to hold that it was not intended to confer upon the Court a jurisdiction to determine equitable rights. The case does not rest on the fact of an action tried before the judge on circuit, but on the fact that an interpleader order had been made, and the money paid into Court; and that order having been made, jurisdiction is given to us to determine who is the person entitled to the money so paid into Court.

That is the substantial question; and the assignee of the bankrupts can have no right to which the bankrupts were not entitled in equity as well as at law. Now it is true that some cases use the expression that the ship must be earning freight, but I take it to be clear that the freight passes with the assignment of the ship; and though to enable the mortgagee to establish his right to the freight, it is necessary that he should do some act, yet as soon as he does an act to shew that the mortgagor is not his agent, he is immediately entitled to have it paid to him. Now here possession was taken, or notice, which is tantamount to possession, was given, before the money was actually paid; there can, therefore, be no doubt that the mortgagee is entitled.

KELLY, C.B. The substantial question is, whether the plaintiff or the defendant is entitled to the money now in Court. That is the question they have agreed on, and stated in the conclusion of the case as the question for our determination. In substance that question is, whether, if the assignees had thought fit to bring an action against the charterers, and had recovered judgment, the plaintiff would have been entitled to file a bill to stay the execution, and to restrain the charterers from paying over the money; and if the parties have determined to state a case on this point, and to ask our judgment whether as between them the plaintiff or the defendant is entitled, we must decide the question on that footing.

The plaintiff claims the freight as payable to him by virtue of the demand made by him upon the mortgagors and the charterers. The question is, not whether possession was in fact taken, but whether anything equivalent to taking possession had been done. The law is established, that the mortgagee of a ship takes at once under his mortgage all the rights of the mortgagor, except the right to be paid freight, and to that he is not entitled till he enters into possession, or does something equivalent to it. But he cannot take possession of a ship at sea, and it is therefore in such a case sufficient if he does anything else which manifests his title. This was not done in *Gardner* v. *Cazenove* (1), and it is in every case a question of fact rather than law, whether the mortgagee has so entitled himself. Now here the plaintiff *has* done something equivalent to taking possession, for he has done everything which it was physically possible for him to do. He gives notice, he demands payment, and at last, when the ship is approaching an English port, and it becomes possible to do so, he takes actual possession. I am therefore of opinion, without doubt, that the money, not having been paid over to the mortgagors, or their assignee, the mortgagee is entitled to it in equity. And further, if the charterers had disregarded his notice and demand, and had paid the freight to the

(1) 1 H. & N. 423; 26 L. J. (Ex.) 17.

assignee, I am of opinion that the plaintiff would have been entitled to recover that money from the assignee as money received to his use. But without reference to that question the plaintiff is, on the other grounds I have stated, entitled to our judgment.

Judgment for the plaintiff.

Attorneys for plaintiff: *Chester & Urquhart, for Lace & Co., Liverpool.*

Attorneys for defendant: *J. & R. Gole, for Evans, Roose & Lockett, Liverpool.*

McFADZEN *v.* THE MAYOR AND CORPORATION OF LIVERPOOL.

June 9.

Interrogatories—Criminating Question—Time for taking Objection—Interrogating Officer of Corporation.

In an action for malicious arrest and false imprisonment brought against a municipal corporation, the plaintiff was allowed (Martin, B. doubting) to interrogate the town clerk whether he caused the plaintiff to be arrested, and by what authority he did so.

Semble, the rule as to interrogatories is to allow all questions to be put that are material, bonâ fide, and not scandalous, and any objection to answer is to be taken at the stage of answering and under the oath of the interrogated party.

4 CP 72
— 767
2 Ex D. 324
4 CP. 187
5 CP. 740
10 CP 224
8 Ch D
10 QBD

In an action for malicious arrest and false imprisonment, malicious prosecution, and wrongful dismissal, the plaintiff sought under 17 & 18 Vict. c. 125, s. 51, to administer to Joseph Rayner, the defendants' town clerk, interrogatories to the following effect:—

1. Were you town clerk of the said borough of Liverpool in and during the months of June, July, and August, 1867?

2. Did you in or about the month of June, 1867, cause the plaintiff to be arrested upon a charge of feloniously stealing the monies of the defendants, or upon any other and what charge, or did you give instructions or directions to any one, and if so, to whom, to arrest the plaintiff, or to cause or procure the plaintiff to be arrested upon any such and what charge, or did you in any way and how take part in, or were you in any manner and how concerned in the arresting of the plaintiff, or in causing or procuring the plaintiff to be arrested upon any such and what charge?

3. Interrogated the town clerk by what authority he did the

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things interrogated upon in the 2nd interrogatory, if he so did them?

4. Interrogated whether he was, as town clerk, informed of the arrest of the plaintiff, and whether he notified the fact to the town council, or to any committee or sub-committee thereof, and whether any resolution or minute was made relating to the arrest of the plaintiff?

5. Had you the management of, or did you take any and what part in, or were you in any manner and how concerned in the prosecution in the months of June and July, 1867, or in one of such months, of the plaintiff before the magistrates on the Liverpool Borough Sessions on a charge of feloniously stealing the monies of the defendants, or any other and what similar charge; and if so, state on whose behalf you had the management of or took part in or were concerned in such prosecution?

6. Similar to 4th, except that it interrogated with reference to the prosecution instead of the arrest?

7. Was the arrest of the plaintiff caused, or his prosecution instituted or carried on, by the authority or direction or with the sanction of the defendants, or of the town council of the said borough, or of any and what committee or sub-committee thereof, or by the authority or direction, or with the sanction of yourself, or some and what officer or servant of the defendants?

8. Related to the count for wrongful dismissal, and interrogated as to resolutions or minutes of plaintiff's appointment.

9. Interrogated as to documents.

Byles, J., at chambers, having refused to allow these interrogatories, on the ground that they interrogated the town clerk in a matter for which he might have been indicted, the plaintiff applied to the Court, cause being shewn against the rule in the first instance.

R. G. Williams, for the plaintiff, referred to *Bickford* v. *D'Arcy*. (1)

C. Crompton, for the defendants. The interrogatories principally objected to are those relating to the arrest, and these are open to the objection relied on by Byles, J.; but they, as well as the

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(1) Law Rep, 1 Ex. 354. 12 Jur NS 816

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interrogatories relating to the malicious prosecution, are also open to the objection that they seek by fishing questions to establish a cause of action, not only against the defendants, but against a third person, the town clerk. The 4th and 6th interrogatories are also objectionable on the ground that the plaintiff is a burgess of Liverpool (1), and can therefore obtain any information as to the recorded proceedings of the town council by using his own right of examining the books as a burgess. The 9th interrogatory is objectionable on the ground that many of the documents are privileged.

[Bramwell, B. The contents of the documents are not asked for, but only an enumeration of them, that they may be ear-marked.]

Kelly, C.B. I think these interrogatories ought to be allowed. No doubt the Court has a discretion, and is bound to exercise that discretion to see that no scandalous or impertinent questions are put; but these interrogatories appear to be bonâ fide and material.

Martin, B. My impression is that my Brother Byles was right in refusing these interrogatories. I doubt whether a man ought to be placed in such a position, that he must either criminate himself or refuse to answer.

Bramwell, B. The Court has, of course, a discretion to say that it will not admit of irrelevant, offensive, or scandalous questions. But we ought not, I think, to allow a question to be shut out only because the opposing counsel says that it is a question which the interrogated party may, perchance, object to answer. In equity any question that is material may be put, and the objection to answer it must be made under the oath of the person objecting, not on the mere assertion of counsel. Therefore, unless we can see clearly that the question is one that ought not to be put, we ought to allow it, and to leave the objection to be taken at the stage of answering.

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Channell, B. I am of the same opinion. I think the principle suggested by my Brother Bramwell is the fair and right one,

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(1) It so appeared by affidavit.

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and is the principle which is to be gathered from the recent cases. It was not intended by the legislature that the interrogating party should be shut out from putting any question that is really material to his case. If he goes beyond that, and the Court sees that his questions are put malâ fide, or with a vexatious or improper purpose, it will not allow them. But if that is not the case, then the interrogated party should be bound to say upon his oath that he believes his answer will be evidence against him in such a way that he is protected from answering.

Interrogatories allowed.

Attorney for plaintiff: *G. W. Chinery.*
Attorneys for defendants: *Wright & Venn.*

Jan. 30.

SMITH *v.* SMITH.

Railway—Superfluous Lands—Abandoned Lands—Construction—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 127, 128.

The 127th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), refers only to superfluous lands, and not to the case of the railway being abandoned or given up. (1)

Ejectment.

By 9 Vict. c. lxiv. (June 18, 1846), the South Eastern Railway Company were empowered to construct a railway from Tunbridge Wells to join the Rye and Ashford Extension.

By s. 1, all the provisions of the company's original act, 6 Wm. 4, c. lxxv., so far as then in force, and so far as not inconsistent with the 9 Vict. c. lxiv., and "save in so far as the same may be inconsistent with the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845," were extended to that

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(1) This case was argued in Trinity Term, 1867, and the Court took time to consider. Judgment was delivered in Hilary Term, 1868, partly in favour of the plaintiff, partly of the defendant; but the plaintiff claimed, according to the principles laid down in the judgment, to be entitled to the whole of the land in question. A summons was afterwards taken out before Bramwell, B., and the judgment was altered accordingly. See note at end of judgment.

act, and the several purposes thereof, as if repeated and re-enacted in that act with reference to such purposes.

By s. 205 of 6 Wm. 4, c. lxxv., it was enacted that the company might, within ten years from the passing of the act, sell superfluous lands, first offering the same to the person or persons whose land immediately adjoined the lands so proposed to be sold.

By s. 218, "If the said railway or any part thereof shall at any time hereafter be abandoned or given up by the said company, or, after the same shall have been completed, shall for the space of three years cease to be used and employed as a railway, then and in such case the lands so purchased or taken by the said company for the purposes of this act, or otherwise the parts thereof over which the said railway, or any part of such railway, which shall be so abandoned or given up by the said company shall pass, shall vest in the owners for the time being of the land adjoining that which shall be so abandoned or given up, in manner following: (that is to say) one moiety thereof in the owners of the land on the one side, and the remainder thereof in the owners of the land on the other side thereof."

By s. 127 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), "Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special act; and in default thereof, all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

By s. 128, except where such lands are within a town, or are built upon, or used for building purposes, the promoters, before disposing of such lands, are to offer to sell the same to the person then entitled to the lands from which they were originally severed, or, on his refusal, or if he cannot be found, then to the person or persons whose lands immediately adjoin the lands so proposed to be sold.

On the 21st of May, 1850, the company purchased and took a

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conveyance of the land in question for the purpose of the proposed line. The piece of land so purchased was a long strip running north and south, and bounded on the east by a highroad, and it was crossed at right angles to the highroad by the site of the intended railway. It was surrounded on all sides by the plaintiff's land, except where it was bounded by the highroad, and the land on the opposite side of the road was owned by the defendant.

By s. 14 of 9 Vict. c. lxiv., in seven years from the passing of the act (i.e., on the 18th of June, 1853) the powers granted to the company by that act and certain recited acts for executing the railway, ceased, and the line was, in fact, never executed.

Within ten years of the time when the powers of the company expired, S. Putland entered into a contract for the purchase of the land. That contract, however, was not so executed as to bind the company, and was not ratified by them until June, 1864, when they sold and conveyed the land to Putland. Putland afterwards resold it to the defendant, who took possession, and was by himself and his tenants in possession of the land and buildings thereon at the time of action brought.

The plaintiff claimed, under one or other of the sections above set out, to be entitled to the land in question, either as superfluous or as abandoned land.

The cause was tried before Bramwell, B., at the spring assizes at Lewes, 1867, and a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him. A rule having been obtained accordingly,

Brown, Q.C., and *Murphy*, shewed cause. First: Superfluous lands and abandoned lands were, under the Lands Clauses Consolidation Act, 1845, treated as on the same footing. The 218th section of 6 Wm. 4, c. lxxv., therefore, relates to the same subject matter as s. 127 of the Lands Clauses Consolidation Act, 1845, and is inconsistent with it, the time limited by the latter act being longer; the 218th section is therefore not incorporated by 9 Vict. c. lxiv. But, secondly, if s. 218 is incorporated, yet by 13 & 14 Vict. c. 83 (1), new provisions are made with respect to abandonment which take away its effect, as they are inconsistent with the strict limitation of time contained in the special act. Thirdly: Even supposing s. 218 to be in full force, yet the section does not give the land to the plaintiff; for if it is in force, it is so on the ground of a distinction between abandoned and superfluous land; but the only part of this land that can be abandoned land is the site of the intended line, and at the time of the abandonment (if there was any such abandonment), i.e., at the expiration of the company's powers in 1853, the company were owners of the superfluous lands on each side of the line. The abandoned site therefore vested in them.

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(1) 13 & 14 Vict. c. 83, s. 15, enacts that the Railway Commissioners may authorize the abandonment of a railway. Section 27 requires that the lands of a railway so abandoned shall be sold within two years.

[They cited *Moody* v. *Corbett.* (1)]

Sir G. Honyman, Q.C., Hance, and *Cohen,* in support of the rule. First: s. 127 of the Lands Clauses Consolidation Act, 1845, does not refer to abandoned, but to superfluous lands only; the result therefore is, that 9 Vict. c. lxiv. incorporates that section with respect to superfluous lands, and s. 218 of 6 Wm. 4, c. lxxv. with respect to abandoned lands. Secondly: the Abandonment Act of 1853 (13 & 14 Vict. c. 83) supplied a defect in the general legislation on the subject, and, for the first time, gave provisions as to abandoned lands applicable to all railway companies. But that act in no way alters the effect of the 218th section of 6 Wm. 4, c. lxxv. If adopted, it takes effect on all lands remaining the property of the company, but if any lands have already ceased to be theirs, the only consequence is that as to them there is nothing for the act to operate upon. But the act has no operation at all unless the company themselves put it in force, and it is not pretended that this has been done. Thirdly: if only the site of the intended line is considered as abandoned, and the extreme ends as superfluous, the result will be the same. To treat the company as the owners of adjoining lands within s. 127 of the Lands Clauses Consolidation Act, 1845, would be clearly contrary to the intention of the legislature, which was to prevent companies from owning land except for the purpose of their undertaking. Superfluous lands remaining in their hands, and not used in their undertaking, continue to be superfluous lands, and if not sold within ten years vest in the adjoining owner, who then becomes the adjoining owner to the abandoned site, and takes that also. But the true view is, that the enterprise having been abandoned, the whole of the land is abandoned land within the meaning of s. 218.

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(1) Law Rep. 1 Q. B. 510.

Cur. adv. vult.

The judgment of the Court (1) (Martin, Bramwell, and Channell, BB.) was delivered by

BRAMWELL, B. The first question in this case is, whether the provisions in s. 218 of 6 Wm. 4, c. lxxv., relating to the disposition of lands where the railway is abandoned or given up, are incorporated with 9 Vict. c. lxiv. We are of opinion they are. The latter act is express, "all provisions, matters, and things in the acts relating to the railway, so far as the same are not inconsistent with this act, shall extend to this act." Then read the latter act with s. 218 in it; no inconsistency will be found, consequently that section is incorporated. But it was said that though that would have been so if nothing but the two acts were in question, yet as the 9 Vict. c. lxiv. only incorporates the provisions of the former act so far as the same are not inconsistent with the Lands Clauses Consolidation Act, and the provisions of s. 218 are inconsistent with that act, they are not included. But this is not so, there is no such inconsistency. Section 127 of the Lands Clauses Act does not apply to where the railway is abandoned or given up, but to superfluous land. But further, if it did, the case would be the same, for by that section, if the land is not sold within ten years from the time for the completion of the works, it is to vest in the owners of the lands adjoining. Here there was no such sale within ten years, there was no conveyance and no binding bargain which would have been specifically enforced. It remains, then, to consider the effect of the 6 Wm. 4, c. lxxv. s. 218, or of the Lands Clauses Act, s. 127, which will be found to have the same operation.

It was said, on behalf of the defendant, that the 218th section only applies to the intended line of the railway, and not to the pieces on either side; and so the railway company, being owners

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(1) See ante, p. 282. (1)

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of the pieces of land on each side of the site of the line, are owners of the adjoining land by virtue of this section.

But supposing this point otherwise good, it is met thus:—By s. 127 of the Lands Clauses Act those pieces out of the line of railway vest in the adjoining owner, that is (subject to what follows) in the plaintiff, and then, he thus becoming owner of the superfluous land on either side, is owner of the land adjoining what was to be the line of railway, and so becomes owner of that. In the result then, the plaintiff is entitled to recover, but not all the land. The defendant is entitled to part. For the land may be shortly described as a long strip, crossed at right angles by the intended line. The plaintiff is owner of the adjoining land on one side of the strip; the defendant of that on the other. (1) He is as much an adjoining owner, therefore, as the plaintiff, and it seems to us, that all the plaintiff is entitled to is so much as lies on his side of a line drawn from the point where his land and the defendant's and the end of the strip meet, along the length of the strip to a similar point at the other end.

For so much, therefore, our judgment is for the plaintiff, and the rule to that extent must be absolute.

Rule absolute.

NOTE.—In this case it afterwards appeared that all the land in dispute would lie on the plaintiff's side of a line drawn as suggested in the judgment, and accordingly it was ordered that the verdict be entered generally for the plaintiff. (2)

Attorneys for plaintiff: *S. F. Langham & Son, for J. G. Langham & Son, Hastings.*

Attorneys for defendant: *Kingsford & Dorman.*

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(1) See note at end of judgment.

(2) This method of division seems contrary to the rule laid down in the Exchequer Chamber in *Moody* v. *Corbett*, Law Rep. 1 Q. B. 510, at p. 518, so far as the judgment proceeds on s. 127 of the Lands Clauses Consolidation Act, 1845.

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June 20.

THE ATTORNEY-GENERAL *v.* DAKIN AND OTHERS.

Royal Residence—Privilege—Sheriff—Process—Hampton Court Palace.

2 QBD 835

Hampton Court Palace forms part of the royal demesnes of the Crown, and was formerly a royal residence, but has not been personally occupied by the sovereign since 10 Geo. 2. The state apartments are, and have been for many years past, used as a picture gallery; the pictures are the property of the Crown, but the public are admitted to view them gratuitously; the other apartments are occupied partly by officers of the palace, but principally by private persons, by the permission and at the pleasure of the Crown. The palace and grounds are maintained by the Crown, by its own officers and servants; a guard of honour is kept there, and service is performed in the Chapel Royal by a resident chaplain appointed by the Crown. The palace is under the control of a housekeeper appointed by the Crown, who has apartments in the palace.

A writ of fi. fa. having been executed in one of the suites of apartments occupied by private persons, and an information of intrusion having been filed against the sheriffs and their officers:—

Held, per Blackburn, Mellor, and Lush, JJ., affirming the judgment of the Court below (dissentientibus Willes, Keating, and Montague Smith, JJ.), that the palace being so occupied that the sovereign could not as a matter of fact immediately resume personal residence, such occupation was inconsistent with its being a royal palace of residence.

Per Curiam. The privilege of palace is attached to any place which is in fact a royal residence, and actual personal residence at the time is not necessary to confer the privilege, if there be an intention on the part of the sovereign to retain the power of immediately resuming personal residence at pleasure.

Affd — H of L. 4 HL 338

ERROR on the judgment of the Court of Exchequer on a special case, stated under 22 & 23 Vict. c. 21, s. 10, on an information of intrusion filed by the Attorney-General against the sheriffs of Middlesex and their officers, who had, on the 10th of February, 1865, executed a writ of fi. fa. in the suite of apartments in Hampton Court Palace occupied by Lady Henry Gordon, the wife of the execution debtor.

The Court of Exchequer gave judgment for the defendants (1), and the Attorney-General brought error.

Feb. 7. The case was argued by

Sir J. B. Karslake, Q.C. (A.G.), (*Sir W. B. Brett, Q.C. (S.G.)* and *M'Mahon* with him), for the Crown; and by *Quain, Q.C.* (*Day* with him), for the defendants.

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(1) Law Rep. 2 Ex. 290.

The same arguments were used and cases cited as in the Court below.

Cur. adv. vult.

June 20. The following judgments were delivered:—

LUSH, J. [after reading the material statements in the special case, proceeded]:—From these statements it appears, first, that Hampton Court Palace is not, and has not been during any part of her Majesty's reign, kept in a condition fit for the reception of her Majesty as an occupant; secondly, that it is and has for all this period been appropriated and used in a way incompatible with a present intention on the part of her Majesty to make any personal use of it, either as a palace of residence or for purposes of state. If, therefore, the immunity claimed by the Attorney-General exists, it must be due to the fact of the palace having once been a dwelling place of the kings of England, and of its still being maintained by her Majesty with the emblems and ensigns of royal dignity as part of the demesnes of the Crown, and capable of being again used as a royal residence if it should be her Majesty's pleasure so to use it. The argument is, in effect, this, that the sacred character which the law attributes to an edifice while it is a royal residence remains permanently impressed upon it so long as it continues to be a royal palace, no matter what may be the purpose to which it is appropriated, or the use that is actually made of it. Such a proposition appears to me not only not supported by, but to be at variance with, the authorities which are to be found on the subject. The privilege, which it is agreed, originates in respect for the personal comfort and dignity of the sovereign, is, as regards her, a right to be free from the molestation and indignity which would be caused by the intrusion of the officers of justice into any place dedicated to her personal use. The privilege rests on no other grounds. It has regard to the sovereign only, not to any subject. It is personal in its nature, belonging not to the place for its own sake, but is attached to the place for the sake of the sovereign who occupies it. It therefore accompanies the sovereign wherever the sovereign goes, but cannot consistently be held to remain where the sovereign has both actually and in intention ceased to be.

The passage cited from 3 Inst. 140, which is the earliest and, indeed, the only direct authority upon the point, expresses both the limitation and extent of the privilege. "Here," says Coke, C.J., speaking of the judgment in the *Earl of Warren's Case*, "two things are principally to be observed; first, that this royal privilege" (viz., exemption from process) "is not only appropriated to the Palace of Westminster, but to all the king's palaces *where his royal person resides*." He does not say "to all the king's palaces" simply, which might include some where the king did not reside; nor does he limit the privilege to that in which the sovereign actually dwelt at the time of the intrusion. The qualifying words, taken in their proper and legal sense, apply to every place which the sovereign keeps for his personal use, whether for special purposes only, as holding courts, &c., or for residence, either permanent, or occasional and temporary. But they clearly exclude places where, though they may be royal palaces, the sovereign cannot be said in any sense to "reside"; and when we look to the reason and ground of the privilege, these words of qualification appear to me to have a designed force and significance, and to be intended to confine the privilege to palaces which are palaces of residence.

The cases cited in the argument are so many illustrations of the rule in its application to the facts of each case. None of them profess to lay down a new rule, or to enlarge or qualify the proposition of Coke; but in each of them the question was treated as one of fact, viz., whether the particular palace was or was not at the time of the intrusion, a royal residence? The conclusion come to in those cases affords therefore no guidance to us in the determination of this.

It was asked by the Attorney-General in the course of the argument, "if Hampton Court Palace is not now privileged, it being certain that it once was so, when did it cease to be privileged?" The answer is obvious, and certain enough for all practical purposes. It ceased to be privileged when it ceased to be kept up for the personal use of the sovereign, and was appropriated to other and inconsistent uses. I agree that it retained the privilege so long as it appeared doubtful whether the sovereign had or had not abandoned it as a place of residence. I adopt fully and

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ATTORNEY-GENERAL *v.* DAKIN.

entirely the language of Lord Ellenborough in *Winter* v. *Miles* (1), that " the question of the discontinuance of any place as a palace of residence, which had at any time been so used by the sovereign on the throne, might involve in its discussion many extremely delicate circumstances;" and that "it would not be a very seemly matter of inquiry whether his Majesty had by any and by what manifestations of his royal will indicated a purpose of not returning to any particular palace." And if the facts of this case were such as to admit of the observations further used by that learned judge, and it could be said of Hampton Court, as was there said of Kensington Palace, that not only are "the emblems and ensigns of royal dignity preserved," but "the apartments exclusively appropriated to his Majesty's use are, by his immediate servants, kept ready and in a fit condition to receive him at any time, whilst others are kept in like manner for the use of his officers, and some are immediately occupied by his Majesty's sons, and no such use is made of the rest of the palace as to preclude or materially interrupt his Majesty's return to it whenever he might choose so to do," I agree that in such a state of things, there being no other manifestation of the royal purpose than the not having for a considerable time inhabited the palace, any inquiry into her Majesty's intention would be unseemly and improper, and I should have held the palace still privileged as a royal residence; but seeing that no part of Hampton Court Palace has ever been appropriated to her Majesty's use, or kept ready to receive her, and that those parts of the building adapted for habitation have been for a period commencing long anterior to, and continuing through the whole of her Majesty's reign, appropriated in such a way as to preclude or materially interrupt her Majesty's resort to it as a place of abode, I am not driven to any such inquiry, but am constrained to regard such a change from the use formerly made of Hampton Court as a notification that the palace has been abandoned as a royal residence.

I am therefore of opinion, that the judgment of the Court below ought to be affirmed.

MELLOR, J. [whose judgment was read by Blackburn, J.] I am of opinion that the judgment of the Court below should be affirmed. The circumstances stated in this case induce me to answer in the negative the question which was put to the jury by Lord Ellenborough in the case of *Winter* v. *Miles* (1), which I may thus state, Is Hampton Court Palace bonâ fide a royal palace? of course I do not mean, nor did Lord Ellenborough mean, a palace belonging to the sovereign, and in that sense a royal palace, but I assume that Lord Ellenborough meant by the words "bonâ fide a royal palace" a palace actually devoted to the use and enjoyment of the sovereign, which, although she does not actually reside in it, is kept in such state and condition that there would be no obstacle to her Majesty's immediate use of it, if such should be her pleasure.

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(1) 10 East, at p. 581.

The decision of the present case turns upon a question of fact: does the use to which Hampton Court Palace is now, and has for so long time been put, indicate the pleasure of the sovereign to abandon it as a *palace of residence?* I think that the facts do clearly shew, in the language of Lord Ellenborough (2), that "the immediate personal residence of his Majesty was by means of an occupation of the palace incompatible therewith, rendered impracticable." The palace is, in fact, "so occupied by others, that his Majesty could not immediately return and reside there in his own person if he were pleased to do so." When I say that the facts shew that her Majesty could not immediately return and reside there, I mean that the circumstances attending the present actual occupation of the palace by others, are such as practically to preclude the possibility of her Majesty returning to it as a "bonâ fide" royal residence.

The reason upon which the immunity from the execution of legal process within a royal palace proceeds is personal to the sovereign, and is not an incident of the place. It is the actual or potential present residence of the sovereign which draws to the place the immunity in question; as it would be inconsistent with the reverence and respect due to the dignity and comfort of the sovereign to permit the intrusion of the officers of the sheriff for the purpose of executing process within a palace in which her Majesty does actually reside, or which she retains as a *palace of*

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(1) 10 East, 578.

(2) At p. 582.

residence. When it ceases to be a palace of residence then the immunity ceases.

If I am asked when the immunity ceased in the present case, I can only answer that it ceased so soon as the palace was, by the consent of the Crown, put to uses practically inconsistent with the personal residence of the sovereign. I forbear to refer to the other cases which were cited in the argument before us, because they were all discussed in the case of *Winter* v. *Miles* (1); and the difference of opinion amongst the judges in the Court below, as well as on the present occasion, does not turn upon any rule of law, so much as on the various conclusions which they have arrived at upon the facts stated in the case.

BLACKBURN, J. In this case I believe the law is agreed by all to be, that civil process cannot be executed within the precincts of a royal palace or residence without leave obtained from the sovereign. The difference of opinion is as to whether, in point of fact, on the evidence stated in the case, Hampton Court is such a palace or royal residence as to come within the acknowledged rule of law. And, as I think, we must in deciding this question of fact bear in mind the reason of the privilege thus conferred by the law on royal palaces.

It is stated by Lord Gifford in *The Earl of Strathmore* v. *Laing* (2), that "this privilege is given not merely because otherwise the king might be deprived of the services of his domestics, but that it is not seemly that the royal palace or the royal presence should be exposed to be made a scene of disturbance and confusion." This is, I think, correct, and it shews that the foundation of the whole depends on the reverence due to the person of the sovereign; and consequently I think that in deciding the question of fact whether any particular place is part of a royal palace so as to be privileged from the execution of process, the test must be, whether the occupation is so ancillary to the residence of the sovereign that the execution of process there would expose the sovereign to the risk of disturbance inconsistent with the respect due to the dignity of the royal person.

It is clear, both on authority and on the reason of the thing,

(1) 10 East, 578.

(2) 2 Wils. & Sh. at p. 6.

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that actual personal presence by the sovereign is not necessary. The sovereign may have, and in point of fact has, several residences at the same time; and it would obviously be inconsistent with the respect due to the sovereign to execute process in Windsor, when her Majesty was in fact at Buckingham Palace, or vice versâ, both being undoubtedly royal residences; and the authorities are conclusive that a palace may be kept up as a royal residence, although no sovereign has actually in person visited it for a great many years. In the case of Holyrood Palace in Scotland, more than a century and a half had elapsed during which no sovereign had so much as entered the kingdom of Scotland, yet the House of Lords decided that in fact Holyrood had always been kept up as a royal residence. And Lord Gifford, in giving the judgment of the House of Lords, gave great weight to the fact that Holyrood had unquestionably been at one time occupied as a royal residence, and therefore would continue so until some change took place in the occupation; and that it rested on those that alleged that such a change had taken place to shew it.

I take it, however, to be clear that such a change may take place, and that it is a question of fact in each case whether it has taken place. Few, I think, would doubt that Winchester, Bridewell, Eltham, and other ancient palaces in England, and Stirling and Linlithgow in Scotland, have long since ceased to be royal residences.

In the 2nd Anne (A.D. 1704), within six years after the fire which, in 1698, dismantled Whitehall, the question rose in *Elderton's Case* (1) whether Whitehall was still a royal residence. There could not have been the least doubt that up to the time of the fire it was one. Lord Holt seems to have thought it had ceased to be so; Powell, J., that it still continued to be one. No decision was come to, the prisoners being discharged, probably because the advisers of the Queen thought it injudicious to insist on the prerogative in a case where the claim was invidious, even if well-founded in law. Now, in the year 1868, I do not suppose there can be much doubt that in fact Whitehall is no longer a royal residence. In *Winter* v. *Miles* (2), in 1809, the question was raised whether Kensington Palace was then still a royal residence.

(1) 2 Ld. Raym. 978.

(2) 10 East, 578.

That was treated as a question of fact, and left to a jury, who found that it still was a royal residence. In the judgment of the Court of King's Bench strong evidence is stated tending to shew that the palace was "kept up fit for his Majesty's reception if he should choose to visit it." I do not know whether now, after the lapse of fifty-nine years, the facts remain the same; but I think no one could complain of a verdict in favour of the privilege on evidence such as is stated by Lord Ellenborough in giving judgment in the King's Bench.

Those three are the only cases in which any point similar to the present has been discussed. In each case the question is treated as one of fact, whether the place still was kept up as a royal residence?

Now in the present case I find it stated as a fact, that Hampton Court was personally occupied by King George II. as a royal residence. From the statements in paragraphs 7 and 8, it appears that the grounds and gardens are still kept up as royal grounds and gardens with much of the state originally attendant on the royal presence. But I find from paragraphs 6, 10, 13, and 14 (1),

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(1) The paragraphs here referred to by his lordship are as follows:—

6. The palace contains a suite of rooms called "The State Apartments," all of which contain a collection of pictures, the property of the Crown; a room formerly called by the name of "The Board of Green Cloth," and now by the name of "The Withdrawing Room," to which the public, under certain regulations, are permitted to have access; and a gallery which the public are not permitted to enter, and which is used as a depository for lumber. For the last sixty years the state apartments have not been used for any other purpose.

10. There are several other apartments in the palace which are in the occupation of private individuals; some consist of spacious drawing rooms, dining rooms, bed rooms, servants' rooms, kitchen, and other domestic offices suitable for the residence and accommodation of persons with considerable household establishments, and are now, and always have been, occupied by persons of rank and distinction, and others are occupied by persons of respectable station.

13. The occupiers of these suites of apartments provide, at their own expense, every kind of household furniture and fixtures requisite for the furnishing and fitting up of such apartments. Previously to occupiers taking possession of the apartments, such repairs as may be considered by the officers of the Crown as necessary to be done to such apartments are done at the expense of the Crown; but in some instances, where the repairs desired for the accommodation of such occupiers have been of such a nature as to require a considerable outlay, such repairs have been effected at the joint expense of the Crown and occupiers; but all alterations or additional works required

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that the whole of the palace (with the exception of what are called the state apartments mentioned in paragraph 10) is occupied by families between sixty and seventy in number, who have their own furniture and their own establishments there.

It is on the extent of this occupation that I rely. I think it is obviously impracticable for the sovereign to resume her residence at Hampton Court without ejecting at least a large part of those families, so as to make room for the suite and attendance necessarily attendant on the royal person; for the state apartments described in paragraph 10 are not such as to be capable of containing even the sovereign alone, far less her suite.

It is quite true that these families have no legal right to notice to quit. The sovereign might eject all or any of them, allowing them no further time to go out than would be necessary to remove their goods and furniture. But I think, in drawing inferences of fact, we are not to impute to her Majesty and her three immediate predecessors any intention to act in a manner which would be ungracious, though legal. And consequently, when I find that permissive occupation has for a long series of years been granted to such an extent as to be inconsistent with the immediate personal residence of the sovereign, unless that permissive occupation was terminated in a manner, legal, no doubt, but very ungracious, I draw the inference of fact that the intention to preserve the

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by the occupiers are done at their own expense, and in some instances such additional works and alterations have amounted to 1000*l*. and upwards. Afterwards, the occupiers themselves are bound, at their own expense, to do whatever internal works, alterations, and repairs may be found necessary for keeping up and preserving the apartments in a proper and tenantable condition, or which they may consider essential to their greater convenience and enjoyment; but no works, alterations, and repairs are done except under the directions of the officers of her Majesty's Office of Works, and the government contracting tradesmen are employed and paid by the occupiers of apartments. Formerly a periodical survey was made of the apartments every second year by the officers of the Crown, and a report made of the repairs necessary for placing them respectively in tenantable repair, and notices were given by the Crown to the occupiers to have such repairs done, which were done by them accordingly. The practice of making these periodical surveys and giving these notices has been for some years discontinued, and surveys are now made and notices given in each instance as circumstances may appear to require.

14. The number of families now occupying such suites of apartments in the palace may be taken to amount to from sixty to seventy.

power of immediately resuming immediate personal residence at pleasure has been abandoned, and consequently that Hampton Court has ceased to be kept up as a royal residence in such a sense as to privilege its inmates from the execution of process there. I therefore think that the judgment below should be affirmed.

Willes, J., read the judgment of himself, Keating, and Montague Smith, JJ., prepared by

Keating, J. This is an information of intrusion, brought by the Attorney-General against the defendants, sheriffs of Middlesex and their officers, for having unlawfully intruded into her Majesty's ancient royal palace of Hampton Court by executing a writ of fieri facias upon the goods of a private person occupying a suite of apartments in the palace by permission of her Majesty, and the question is, whether the defendants are liable to such proceedings.

That Hampton Court Palace was a royal residence, and as such privileged from the execution of legal process within its precincts, seems clear from the case; but it is said that, the sovereign having ceased for a century or more to reside there personally, and the arrangements of the palace being such as to make it unsuitable for the immediate personal residence of the sovereign, the privilege of exemption now claimed has ceased to exist. The privilege, no doubt, was originally established by law in order not merely to avoid the personal annoyance to the sovereign from the execution of process when he himself was personally present, but also the scandal consequent upon such execution within the precincts of a royal palace, and therefore the authorities have not confined this privilege to palaces where the sovereigns have been in actual residence, but have extended it to such royal palaces still retained under the care and control of the sovereign, and the occupation of which is such that personal residence could at any time be resumed. The cases of Kensington Palace and Holyrood Palace fully sustain this view (see *Winter* v. *Miles* (1) and *The Earl of Strathmore* v. *Laing*) (2), and, we think, govern the present case; for, whatever the decision might have been

(1) 10 East, 578.

(2) 2 Wils. & Sh. 1.

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had the matter been res integra, we are of opinion it cannot be substantially distinguished from these cases. Minute differences may, no doubt, exist; but, as pointed out in the judgment of the Lord Chief Baron in the Court of Exchequer, with which we agree, all the important circumstances in the authorities he refers to concur in the present case.

We see no reason, therefore, for placing Hampton Court upon a different footing from Kensington and Holyrood Palaces, and are of opinion that the privilege claimed attaches in the present case. Nor is it likely that the existence of this privilege will ever lead to injustice or inconvenience, as an application to the Lord Steward, or other proper officer of her Majesty's household, will always obtain a remedy for the creditor, either by a permission to execute the process within the palace, or by his insisting upon the prompt discharge of the debt as a condition of the enjoyment of her Majesty's bounty.

It is proper to add that the occupants of the palace, although not mere intruders, and having, therefore, a valid possession as against wrongdoers, have no tenure even at will as against the Crown, and are bound to quit at a moment's notice: see *Harper* v. *Charlesworth.* (1)

We think the judgment of the Court of Exchequer should be reversed; but the Court being equally divided, the judgment of the Court below will be affirmed.

Judgment affirmed.

Attorney for the Crown: *The Solicitor to the Board of Works.*
Attorneys for defendants: *Burchall & Hall.*

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(1) 4 B. & C. 574.

[IN THE EXCHEQUER CHAMBER.]

1868
July 6.

4/12/55
1CPD.50

HALLIDAY *v.* HOLGATE.

Pledge—Sale by Pledgee—Trover—Bailment.

A holder of scrip certificates for shares borrowed of the defendant a sum of money on his own promissory note, payable on demand, and on the security of the shares, and deposited with the defendant the scrip certificates. He afterwards became bankrupt, and the defendant, without demand and without notice, sold ten of the fifteen shares to repay himself his debt. The creditors' assignee, without making any tender of the amount of the debt, brought an action of trover against the defendant to recover the value of the shares:—

Held, affirming the decision of the Court of Exchequer, that, even assuming the sale to be wrongful, the immediate right to the possession of the shares was not by the sale revested in the plaintiff, and that he could not therefore maintain trover, either for the whole value of the shares or for nominal damages.

Donald v. *Suckling* (Law Rep. 1 Q. B. 585), approved.

Appeal from the judgment of the Court of Exchequer, discharging a rule to enter a verdict for the plaintiff in an action of trover brought by the creditors' assignee of one Bentley against the defendant to recover the value of certain shares, the defendant pleading, amongst other pleas, not possessed.

On the 30th of April, 1866, Bentley bought of one Scholefield fifteen shares in the Whitewell Mining Company, Limited, which, by the articles of association of the company, were not transferable till the 2nd of January, 1867, and Scholefield at the same time, by a memorandum in writing, agreed to execute a transfer of the shares to Bentley as soon as he legally could. Bentley at the same time bought ten other shares in the same company, and took a similar memorandum.

In June, 1866, Bentley borrowed of the defendant 350*l.* on his own promissory note payable on demand, and on the security of the twenty-five shares above mentioned, and he at the same time handed to the defendant the two agreements, promising to deliver to him the scrip as soon as he received it. On the 16th of January, 1867, Bentley handed to the defendant the fifteen scrip certificates for the first fifteen shares, and received back the agreement relating to the ten shares, on paying 100*l.* on account of the debt.

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On the same day Bentley's firm stopped payment; they were afterwards adjudicated bankrupts, and the plaintiff was appointed creditors' assignee, Bentley absconding before passing his final examination. The defendant, after the bankruptcy, sold the scrip of ten of the fifteen shares, but it did not appear that he had made any demand on, or given notice to, either Bentley or the plaintiff, the assignee. The value of the scrip for the ten shares was admitted to be 200*l.*

The cause was tried before Mellor, J., at the Liverpool spring assizes, 1867, and the learned judge nonsuited the plaintiff, reserving leave to him to move to enter a verdict for him for 200*l.*, or such other sum as the Court should think fit. A rule was obtained accordingly, and was, after argument in the Court below, in Hilary Term last, discharged on the authority of *Donald* v. *Suckling*. (1) The plaintiff appealed.

Jordan, for the appellant, contended that no demand having been made, and no notice given, the pledgee had no right to sell, and that selling before his time he committed a conversion for which the plaintiff was, at least, entitled to nominal damages: *Johnson* v. *Stear*. (2) He distinguished the present case from *Donald* v. *Suckling* (1) on the ground that there the action was detinue, here trover, and he referred to the words of Blackburn, J., p. 611.

[BLACKBURN, J. The words used are that "the plaintiff may be entitled to maintain an action of *tort* against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures." The words were carefully chosen, and taken in their connection they exclude the inference that they refer to any action which depends upon the right to immediate possession.]

Quain, Q.C. (*Herschell* with him) was not called upon.

[The case originally raised a question of fraudulent preference, but this point was abandoned. The question as to whether the defendant was, according to the terms of the pledge, entitled to sell at the time he did, and also the question whether, independently of the rights and liabilities created by the pledge, any conversion of the scrip could, in fact, be said to have been committed, were also discussed, and on the first point *Martin* v. *Reid* (1) and *Pigot* v. *Cubley* (2) were cited, but the points were not formally argued, the decision of the Court turning on the plea of not possessed.]

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(1) Law Rep. 1 Q. B. 585. 12 Jur N.S. 1795

(2) 15 C. B. (N.S.) 330; 33 L. J. (C. P.) 130. 10 Jur N.S. 199

The judgment of the Court (Willes, Blackburn, Keating, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. We are all of opinion that this judgment must be affirmed. The action is brought by an assignee in bankruptcy to recover the value of certain scrip certificates of the bankrupt, alleged to have been converted by the defendant. The defendant was under advances to the bankrupt, in respect of which the bankrupt pledged to the defendant the certificates in question. The bankrupt became in default, and absconded, and the defendant thereupon sold a part of the certificates sufficient to repay the whole or part of the amount due to him. The assignee seeks to recover either the whole value or nominal damages in respect of the wrong done by the sale. As to the claim for the whole value, it is certainly a strong contention. The scrip certificates were in the hands of the defendant as a security for money due, and the assignee has sustained no actual damage, for the debt could have been paid no otherwise, yet the assignee seeks to recover the whole value as if at the time the certificates were his own. It does not require much argument to shew that there is no principle for such a rule, and we should not be disposed to act upon it unless we are compelled by some authority to do so. But the authorities invite us to do the reverse, for *Johnson* v. *Stear* (3) shews that if any action lies at all in such a case, the verdict can only be for nominal damages, and that an allowance must be made for the amount of the debt which has been thus satisfied, that being the amount which the pledgor or his assignee would have had to pay before he

(1) 11 C. B. (N.S.) 730; 31 L. J. (C. P.) 126.

(2) 15 C. B. (N.S.) 701; 33 L. J. (C. P.) 134. 10 Jur N.S. 1318

(3) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130. 10 Jur N.S. 599

could have required the article to be delivered up. We are quite satisfied to abide by that decision.

But it has been argued that the plaintiff is at any rate entitled to nominal damages, for that a conversion was committed by the sale of the certificates. That sale, it is contended, had the effect of putting an end to the bailment of pledge; the property of the pledgee was thereby determined, so as to enable the assignee to say that at the moment when the sale took place he became entitled to the certificates by virtue of the general property which then revested in him. This reasoning proceeds upon a somewhat subtle and narrow ground, for it is admitted that the assignee could only claim nominal damages. But we cannot arrive at the conclusion that he is so entitled without getting rid of the case of *Donald* v. *Suckling* (1); and so far from feeling disposed to overrule that case, we are satisfied of its good sense, and think that it puts the whole matter on a plain and intelligible footing. There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage—viz., a pledge—where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or of detinue, each of which assumes an imme-

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(1) Law Rep. 1 Q. B. 585. 12 Jur NS 795

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diate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Anderson & Collins, Liverpool.*
Attorneys for defendant: *Shaw & Tremellan.*

TAYLEUR *v.* WILDIN.

June 12.

8 Ex 76

Landlord and Tenant—Tenancy from Year to Year—Notice to Quit—Determination of Tenancy—Guarantee—Principal and Surety.

By a notice to quit given to a tenant from year to year, his tenancy is determined on the expiration of the current year, and a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one.

M. being yearly tenant to the plaintiff on the terms of a written agreement, the defendant, in consideration of the plaintiff's continuing M. as such tenant, gave to the plaintiff a guarantee for "the rent of the Leese Farm in the occupation of M." The plaintiff afterwards gave M. notice to quit, but on the payment of arrears of rent withdrew it, before the expiration of the current year. The next year the rent became in arrear, and the plaintiff sued the defendant on his guarantee:—

Held, that the old tenancy was determined by the notice to quit; that the guarantee applied only to the tenancy which existed at the time when it was given; and that the defendant was therefore not liable.

In this action, which came on for trial before Shee, J., at the Shrewsbury spring assizes, 1868, a verdict was entered for the plaintiff, subject to the opinion of the Court on a special case which stated as follows:

In 1863, one Samuel Morgan had for some years occupied a farm of the plaintiff's as tenant from year to year, on the terms of a written agreement, the tenancy commencing at Lady Day. On the 24th of March in that year, in consideration that the plaintiff would continue Morgan in his tenancy of the farm, the defendant signed the following guarantee:—"1863, March 24th. This is to certify that I, the undersigned John Wildin, of Hadley, will be responsible to William Tayleur, Esquire, of Buntingsdale, for the rent of the Leese Farm in the occupation of Samuel Morgan. (Signed) John Wildin."

On the 26th of September, 1865, the rent being in arrear, the plaintiff gave notice to Morgan to quit the farm at the expiration of the current year's tenancy; but, on the 3rd of February following, the arrears of rent being paid up, the notice was withdrawn, and Morgan continued in occupation of the farm under the terms of the agreement.

In September, 1866, the rent was again in arrear, and notice to quit was again given to Morgan. The rent then due was afterwards paid, but the plaintiff gave notice to the defendant that he would hold him responsible for the next Lady Day rent. At Lady Day, Morgan quitted without paying the rent, and the plaintiff now sought to recover the same from the defendant on the above guarantee.

T. S. Pritchard (*Huddleston, Q.C.*, with him), for the plaintiff. The tenancy in respect of which the rent was guaranteed was Morgan's tenancy from year to year, which, on the withdrawal of the notice to quit, was continued under the old agreement to Lady Day, 1867, and was therefore the same tenancy.

Gray, Q.C. (*Tapping* with him), for the defendant. The old tenancy was put an end to by the notice to quit of September, 1865, and the tenancy under which Morgan occupied the farm after Lady Day, 1866, was in fact a new tenancy upon the old terms, created by the waiver or withdrawal of the notice to quit; see per Jervis, C.J., in *Blyth* v. *Dennett.* (1) The debt, therefore, which Morgan owes to the plaintiff is not the same debt which the defendant guaranteed, but a new debt constituted by a new contract, in respect of which the defendant is under no liability: see Pothier, as cited in Chitty, Cont. 7th ed. 479.

Pritchard in reply. *Blyth* v. *Dennett* (1) decides nothing except that a mere demand of rent for time subsequent to the expiration of a notice to quit does not of itself, and as a matter of law, waive the notice and continue the tenancy, but is only evidence for a jury; following in this *Doe* v. *Batten.* (2) The observation of Jervis, C.J. (which was obiter), was made with reference to the facts of that case, where the tenancy had actually expired by the operation of

(1) 13 C. B. 178, 180; 22 L. J. (C.P.) 79, 80.

(2) Cowp. 243.

the notice to quit, and efflux of time before the alleged waiver, but in the present case the notice had been withdrawn before the expiration of the tenancy, so that the tenant's interest was a continuing one. But if this is otherwise, the guarantee need not be confined to a strictly continuous legal tenancy, but rather refers to a continuous holding, in fact, upon the old terms.

KELLY, C.B. We are certainly here inter apices juris, but the objection taken must prevail. The distinction between the present case and *Blyth* v. *Dennett* (1) is a distinction in fact, but not in principle. The question is, whether the tenancy under which this rent became due was the same tenancy as that in respect of which the guarantee was given, or was a new tenancy, and if the notice to quit was a notice that could be withdrawn and done away with at the option of the party giving it, and it was in fact so withdrawn whilst the tenancy subsisted, the tenancy would not have been determined. But it is clear that, whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both. If that is so, then the consent of the parties makes a new agreement, and if there is a new agreement there is a new tenancy created to take effect at the expiration of the old tenancy. That is so here; and therefore this rent became due on a new tenancy, to which the guarantee does not apply; for it applies only to the tenancy which existed at the time when it was given.

MARTIN, B., concurred.

BRAMWELL, B. I am of the same opinion. A tenant from year to year has an interest in the land for so long as neither party gives a six months' notice to quit. When that is done the estate is determined. This would be abundantly evident if we were to suppose the agreement to be reduced into writing, embodying the term that the tenancy should be determinable by a six months' notice. If the notice is given, the tenancy is at an end; the parties may by a parol contract create a new tenancy, which is

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(1) 13 C. B. 178; 22 L. J. (C.P.) 79.

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what is meant by the phrase withdrawing the notice, but the old tenancy no longer exists, and the guarantee, which only applied to the old tenancy, is gone.

Judgment for the defendant.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorneys for defendant: *Skilbeck & Griffith.*

May 26.

THE DUKE OF BUCCLEUCH *v.* THE METROPOLITAN BOARD OF WORKS.

Award—Admissibility of Umpire's Evidence—Injurious Affection of Premises—Substitution of Roadway for River—Loss of "Amenity"—Lands Clauses Act, 1845—*Thames Embankment Act,* 1862 (25 & 26 *Vict.* c. 93)—*Taking of an Easement.*

1CPD. 385-
391,-6
410,

The plaintiff was lessee of the Crown for the residue of a term of ninety-nine years from January, 1855, of a house and premises at Whitehall, together with all ways, easements, and appurtenances whatsoever thereto belonging or "therewith or with any part thereof held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part or parcel thereof." Until the execution of the works hereafter mentioned the premises abutted eastward on the river Thames, and were bounded by a wall along the whole length of which, at high water, the river flowed. In this wall was a gate, usually kept locked, leading from the garden of the house to a causeway which ran out into the river to low-water mark. The causeway was, and for more than forty years had been, exclusively used by the plaintiff, for landing from the river various articles of household use, and for other purposes.

The defendants (the Metropolitan Board of Works), in 1863, commenced the construction of an embankment of the Thames, from Westminster to Blackfriars Bridge, under the powers given them by the Thames Embankment Act, 1862, and in the course of working they removed the plaintiff's causeway and a landing place connected with it, and entirely shut off the plaintiff from direct access to the river. Where the water had formerly flowed, a solid embankment, destined for a public highway, was constructed. The plaintiff thereupon gave the defendants, under the Lands Clauses Act, 1845, notice of arbitration and claim for compensation, stating in his notice that he was owner of the causeway as lessee thereof and entitled as such lessee to the use and enjoyment of the landing-place, and of the easements, rights, and privileges belonging thereto, and connected therewith, and claiming compensation for the removal of the causeway and landing-place, and for the depreciation in value of his house and lands, and otherwise injuriously affecting them. The arbitrators referred the question of the amount of compensation payable to an umpire, who eventually awarded 8325*l.* to the plaintiff "as and for compensation for the interest of the Duke of Buccleuch (the plaintiff) in the said causeway, pier, or jetty, and for shutting up the said landing-place, and for damage by the depreciation of the said house, &c., by the otherwise injuriously affecting the same by the execution by the said board (the defendants) of the said works, and by the exercise of the powers of the said act." The award was good on the face of it.

At the trial of an action on the award the umpire was examined on behalf of the defendants as to the mode in which he had arrived at the sum awarded. He stated that amongst other items he had given 5000*l.* for depreciation of the premises in value, and that in fixing that amount he had taken into consideration the loss of privacy and "amenity" which the plaintiff had sustained through the defendants' works:—

Held, that the plaintiff was entitled to recover in the action.

Per Kelly, C.B., Martin and Channell, BB., that the umpire's evidence was admissible, but that so far as it was relevant it confirmed the award.

Per Bramwell, B., that the umpire's evidence was not admissible.

Semble, per Kelly, C.B., that the words in the lease conferred an ownership in the soil of the causeway on the plaintiff.

Semble, per Martin, B., that the words conferred on him an easement only.

Per Kelly, C.B., Martin and Channell, BB., that the plaintiff's interest, whether proprietary or otherwise, was sufficient, and was sufficiently described in his notice of claim to entitle him to the compensation awarded to him by the umpire in respect of the matters stated by the umpire to have been included in the award.

Re Stockport Railway Company (33 L. J. (Q.B.) 251), commented upon.

Revd — Ex Ch 5 Ex 221 affd 5 HL 418

DECLARATION. 1st count, that the defendants were the promoters of the undertaking mentioned in the Thames Embankment Act, 1862, within the meaning of the Lands Clauses Act, 1845, and as such promoters were authorized to execute the works in the act described, and to take a certain causeway, pier, or jetty, situate in the parish of St. Margaret, Westminster, and the defendants did enter upon and take the said causeway, pier, or jetty, accordingly, for the execution of the said works, and did execute the said works; and that the plaintiff was entitled to a certain interest in the said causeway, pier, and jetty, and was entitled to compensation for the same being so taken, and also for his interest in all other lands and hereditaments adjacent thereto being injuriously affected by the execution of the said works; that a question of disputed compensation arose thereon between the plaintiff and the defendants; that the said question was referred to arbitration under the Lands Clauses Act, 1845, and two arbitrators were chosen by the plaintiff and the defendants, who duly nominated an umpire before whom the matter in dispute ultimately came; that the said umpire afterwards made his award in writing, of and concerning the said premises so referred to him, and determined

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that the amount of the compensation in dispute should be 8325*l.*; that all things have been done, &c., necessary to entitle the plaintiff to have that sum paid to him, yet the defendants have not paid the same.

Second count, repeating the allegations in the first; alleging that the sum awarded exceeded the sum offered, and claiming the costs of the arbitration.

Third count, for money payable for money awarded, for money paid, and due on accounts stated.

Pleas: 1. To the first and second counts, that the defendants did not enter on and take the said causeway, pier, and jetty, or any of them as alleged, nor was the plaintiff's interest in the adjacent lands and hereditaments injuriously affected by the execution of the said works.

2. To the same, that the plaintiff was not in any manner entitled to or interested in the said causeway, pier, or jetty as alleged, nor was he entitled to compensation for the same being taken, nor was the plaintiff's interest in the adjacent lands and hereditaments injuriously affected by the execution of the said works, nor was he entitled to such compensation as in the first count alleged.

5 Ex 226

3. To the same, setting out the award verbatim, whereby after reciting that the defendants had under the Thames Embankment Act, 1862, entered on a causeway, pier, or jetty, in which the plaintiff claimed to be interested as thereinafter mentioned, and shut up, removed, and obstructed the use and enjoyment of a landing-place there, to which the plaintiff was entitled; that the plaintiff alleged that he had sustained damage by reason of the premises and further damage by the depreciation of a certain mansion-house, lands, &c., belonging to him, and by the otherwise injuriously affecting the same by the execution by the defendants of the works authorized by their act of parliament; that the plaintiff gave notice in writing to the defendants on the 11th of March, 1867, that "he was the owner of the said causeway, pier, or jetty, and also of the said mansion-house, and other lands, tenements, and hereditaments, as lessee thereof, under or by virtue of a lease dated the 19th of April, 1810, granted by his late Majesty King George III., to Henry, Duke of Buccleuch, and his trustee, and of two agreements, dated respectively the 4th of February, 1854, and the 26th

of October, 1858, and made between the Queen's Majesty, the Honourable C. A. Gore, and Walter, Duke of Buccleuch (the plaintiff), for a term whereof at the time of the said entry and taking, and of the said injuriously affecting, ninety years or thereabouts were unexpired, and that he, the said Walter, Duke of Buccleuch, was entitled as such lessee, to the use and enjoyment during the said term of the said landing-place, and of the easements, rights, and privileges belonging thereto, and connected therewith" and claimed compensation by reason of the premises to the amount of 10,000*l.*; and after reciting the various proceedings had upon the reference the umpire awarded 8325*l.* to be due from the defendants to the plaintiff, "as and for the compensation for the pier, and jetty, and for shutting up of the said landing-place, and for the damage by the depreciation of the said mansion-house, lands, tenements, and hereditaments, by the otherwise injuriously affecting the same by the execution by the said board of the said works, and by the exercise of the powers of the said act." The plea then traversed the interest of the plaintiff in respect of the causeway, pier, or jetty, and landing-place, and his title to compensation in respect thereof, and concluded with an allegation that "the said sum of 8325*l.* so awarded as aforesaid was and is awarded as one entire unseparated and undivisible sum of money, and is awarded as such for and in respect of (among other matters) the aforesaid supposed interest of the plaintiff in the said causeway, pier, or jetty, and landing-place, and for compensation for and in respect of the same."

4. To the same alleging that the award was in the terms set forth in the 3rd plea, and that the plaintiff was interested in and entitled to the said mansion-house, lands, &c., by virtue of the several agreements and leases mentioned in the recited notice of the 11th of March, 1867; that before the passing of the Thames Embankment Act, 1862, the garden and pleasure-grounds of the said mansion-house abutted on the river Thames, where the same is navigable and a common Queen's highway by water, and that under that act the defendants embanked the foreshore and reclaimed from the river and foreshore the piece of ground immediately facing the said mansion-house on the river side thereof, and built a wall to the embankment and placed a public highway

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thereon between the plaintiff's mansion-house and the said navigable river, so that there is immediate access from the plaintiff's mansion-house to the highway by land and thence to the river; that the plaintiff alleged that by reason of the defendants so making the said public highway and cutting off the direct access to the said navigable river, and by substituting a public land highway in lieu thereof, the defendants had injuriously affected his said mansion-house, lands, tenements, and hereditaments, and his interest therein, and he claimed compensation by his said notice in respect thereof; that the said sum of 8325*l.* so awarded as aforesaid was and is one indivisible sum for and in respect of (among other matters) the mere fact of the defendants having, under the powers and provisions of the said act, placed and substituted in manner aforesaid the said public highway for the said navigable river.

5. To the same, repeating the introductory allegations of the 4th plea; and further, that the plaintiff had alleged that by reason of the said roadway being brought next to the mansion-house he would be compelled to build a high wall to maintain the privacy of the said mansion-house, &c., and by reason of the said high wall when built the view and prospect from the said mansion-house, &c., towards the river would be circumscribed and diminished; and that by reason of the said embankment wall built by the defendants next to the said river being situated more towards the bed thereof than the former wall bounding the plaintiff's land, the view and prospect towards the river from the said mansion-house would also be circumscribed and diminished, and by reason of the premises the "amenity" of the said mansion-house, &c., would be injuriously affected; and the plaintiff claimed under his said notice compensation in respect of the matters in this plea mentioned; and that the said sum of 8325*l.* so awarded as aforesaid was and is awarded as one indivisible sum for and in respect (among other things) of the matters in this plea particularly mentioned.

6. To the same, averring the award to be as set forth in the 3rd plea, and that the said mansion-house, lands, tenements, and hereditaments, were not, nor was any of them, depreciated, damaged, or injuriously affected in any manner whatsoever by the defendants' works and by the exercise of their powers under the said act, nor

was the plaintiff entitled to compensation in respect thereof as alleged; and that [a similar conclusion to pleas 3, 4, and 5.]

7. To the same, that the said sum of 8325*l.* so awarded as aforesaid was and is one entire indivisible, unseparated, and inseparable sum, and that the said sum includes damages and compensation for things in respect of which neither the arbitrators nor the umpire had any jurisdiction whatsoever.

8. To the same traverse of the making of the award.

9. To the residue of the declaration. Never indebted.

Issue. Demurrer to the 4th plea and joinder.

The plaintiff's predecessors have been for a long period tenants to the Crown of the house in Whitehall Place, Westminster, called "Montagu House," under leases which from time to time have been renewed. One of these leases was dated the 19th of April, 1810, and thereby the king granted to Henry, then Duke of Buccleuch, for a term of sixty-two years from the 5th of January, 1806, all the piece of ground lying in the privy garden within the precinct of the palace of Whitehall, abutting eastward on the river Thames, on which Montagu House stood, "together with all courts, areas, vaults, cellars, sollars, ways, passages, lights, easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever to the said piece of ground, messuage, and premises hereinbefore expressed to be demised, or any part thereof belonging or appertaining, or therewith or with any part thereof held, used, occupied, or enjoyed or accepted, reputed, deemed, taken, or known as part or parcel thereof." This term would have expired in January last, had it not been for two agreements, dated respectively the 4th of February, 1854, and the 26th of October, 1858, made between the Crown and the plaintiff, the present Duke of Buccleuch, whereby it was agreed, that in consideration, amongst other things, of the plaintiff spending 20,000*l.* on the premises, in rebuilding the house and in other improvements, he should have a renewal for a term of ninety-nine years from the 5th of January 1855, at an increased rental. According to the earlier agreement, the money was to be spent and the house rebuilt before the 5th of January, 1858; but the time was extended by the second agreement to the 5th of January, 1861. The plaintiff, it was not disputed, had performed his part under these

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agreements, and was therefore entitled to call on the Crown to execute to him a lease in pursuance of them at any time he might think fit. So far, therefore, as regarded time, his interest in Montagu House and the grounds attached to it, for which compensation was sought, was at the time of the execution of the works by the defendants, that of a lessee for the unexpired residue of a term of ninety-nine years, counting from the 5th of January, 1855.

The plaintiff's premises were formerly bounded on the river side of them by a wall, along the whole length of which, at high water, the river flowed. In this wall was a gate, usually kept locked, and of which the plaintiff possessed the key, leading from some stairs in the garden of the house to a causeway or pier about four or five feet wide, which ran out into the river to low-water mark. The principal purposes for which the causeway was used were for landing coals from barges for the plaintiff's use, and also for landing vegetables, &c., which were constantly being brought by water to Montagu House from a country house possessed by the plaintiff on the banks of the Thames at Richmond. No one but the plaintiff used the causeway, which had been in existence for more than forty years, and no one but himself, or his predecessors, had within that period repaired it. In 1833, when in want of repair, it was restored at the plaintiff's sole expense.

By the 25 & 26 Vict. c. 93 (the Thames Embankment Act, 1862), with which was incorporated the Lands Clauses Act, 1845, and the Lands Clauses Amendment Act, 1860, the defendants, the Metropolitan Board of Works, were authorized to construct an embankment on the north side of the river Thames, from Westminster Bridge to Blackfriars Bridge, and subsequently they proceeded with the execution of the necessary works. In the course of performing them they had occasion to remove the plaintiff's causeway and the landing-place connected therewith, and also entirely to shut off his premises from direct access to the river. In the place where the water had previously flowed a solid embankment was made, on which will eventually be a public highway. By s. 78 of the act, the plaintiff (in common with other lessees of the Crown of land at Whitehall with a river frontage) had the option of taking a lease of so much of the reclaimed

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land as lay between the roadway and his former boundary, for the same term as he already possessed, at a fixed rental; "and such rent shall be estimated on the basis of a fair rental on the land as garden ground which cannot be built upon; and in any claim for compensation by the said lessees on the ground of their lands or interest being injuriously affected by reason of the works by this act authorized, regard shall be had to the option by this section given to such lessees of taking leases of the land and foreshore adjoining to their respective properties at such rent as aforesaid." The plaintiff did not exercise his option under this section.

On the 14th of March, 1867, the plaintiff gave the defendants his notice of claim and arbitration, stating his interest in the causeway in the terms recited in the award, and set forth above in the 3rd plea, and demanding compensation for damage done to him by reason of the defendants taking and using the causeway, and obstructing and removing the landing-place, and for further damage by the depreciation of his messuage and dwelling-house, lands, tenements, &c., and otherwise injuriously affecting the same. The amount payable was referred to arbitrators, who duly appointed an umpire, under the Lands Clauses Act, 1845, before whom the matter was finally investigated. On the 5th of August, 1867, he awarded 8325*l.* to the plaintiff "as and for compensation for the interest of the said Duke of Buccleuch in the said causeway, pier, and jetty, and for shutting up the said landing-place, and for the damage by the depreciation of the said mansion-house, lands, tenements, and hereditaments by the otherwise injuriously affecting the same by the execution by the said board of the said works, and by the exercise of the powers of the said act." The defendants having declined to pay the sum awarded, this action was brought to recover it.

5 Ex 236

The cause was tried before Kelly, C.B., previously to the argument of the demurrer, at the Middlesex sittings after Hilary Term last, when the above facts were proved. The regularity of the formal proceedings and the validity of the award on the face of it were admitted; but the defendants proposed to impeach it by shewing that the umpire had included certain matters in his award which were not the proper subjects of compensation. With this view they tendered the umpire himself (Mr. C. Pollock, Q.C.)

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5 Ex 236 —237

as a witness, in order to explain the mode in which the total sum of 8325*l.* was arrived at. The learned judge admitted the evidence, which, so far as is material, was as follows:—I was the umpire in this matter. The claim was presented to me on the part of the duke in this way: it was said that the duke's causeway was taken from him, and that therefore an easement attached to his house having been taken, he was let in to claim before an arbitrator for the loss and for general damage to the house, including all its "amenities," of whatever kind they might be.

Q. Among the amenities, was the one of view or prospect specifically mentioned?—*A.* Yes. *Q.* Was it not very much dwelt upon?—*A.* It is almost wrong to say loss of prospect. It was the comfort and privacy of the house. I cannot say there was any specific claim for loss of prospect in the sense of view from the house. It was not only the prospect of the water; the privacy was considered. Then there was the head of actual structural injury by the subsidence of a portion of the kitchen.

By the COURT:—You took all these matters into consideration, and awarded 8000*l.* or thereabouts?—*A.* Yes, my lord. *Q.* Will you tell us of what items the 8000*l.* was composed? [This question was objected to, and admitted subject to the objection.]—*A.* I will tell you the mode in which the case for the board, the defendants, was shaped. They said, "True, the duke's house might be injured if he did nothing; but he may, if he likes, under the act of parliament, become a lessee of the Crown of (I think) very nearly half an acre of ground between the house and the river, and you (the umpire) must assume that he will become the lessee of the half acre." I may say, that if I had assumed that he had no power to take that land, my damages would have been larger; and I did assume that he would be advised to take it as lessee of the Crown. Then there was no dispute that, if he did so, the capitalized rent of the garden would be 2475*l.* Adopting, as I did, that sum as a datum, my award was this: loss of jetty, 200*l.*; the structural damage to the walls, 50*l.* I think the kitchen was said to have been penetrated by water. Capitalized rent of the garden, 2475*l.* Then I put it that the expense of building a wall, laying out the garden, and other matters which the duke would be put to, would be 600*l.*; and then I thought that, after all that

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had been done, the house would be of less value to be occupied by a nobleman or gentleman than it had been before by the sum of 5000*l.* If these sums are added together, they make up 8325*l.* *Q.* As to the last item, what was it that occasioned the loss in value of the house?—*A.* I thought, in the market, if that house was to be let to a nobleman or gentleman, he would give less for it by a capitalized sum of 5000*l.* *Q.* How was the 5000*l.* made up; was it 100*l.* for this, and 1000*l.* for that? Can you give us generally what the elements were?—*A.* I cannot give you one single amount, but I can give you the elements. I had evidence before me by the surveyors, who put the sum at 16,000*l.* They said the annual depreciation was 1000*l.* in the rental. I did not think that, but I took into consideration the fact that the Duke of Buccleuch's house had, as it stood before, the road on one side in continuation of Parliament Street to Whitehall, but on the other side perfect privacy. When the embankment was made, the evidence shewed there would be a roadway, and that roadway would be above the present level of the duke's garden; and, therefore, the only thing he could do would be to build a high wall, and shut it out. There would be traffic, and dust, and dirt, and noise, which seemed to me to alter the character of the house entirely. After I had heard all the evidence and arguments, and had been to see the place a second time, and taken into consideration all I could, it seemed to me, although it is true some people might not have the same objection to the alteration that others had, that upon the whole, if a person came there to take the house, he would not give for it by 5000*l.* what he would have given for it before."

5 Ex. 136

No further evidence was offered on the part of the defendants, and the plaintiff, who had not proved in the first instance that there had been any structural damage to the kitchen, did not give any evidence, after the examination of the umpire, on that point. His attention, however, was not expressly drawn to the matter at the time by the defendants. A verdict was entered for the plaintiff for the full amount of the award, with leave to move to enter a nonsuit or verdict for the defendants.

In Easter Term, *Hawkins, Q.C.* (*Philbrick* with him), obtained a rule accordingly, calling on the plaintiff to shew cause why a verdict for the defendants or a nonsuit should not be entered, or a new trial had on the ground that the umpire awarded compensation in respect of items of injurious affection, the existence of which was not shown at the trial; that no title to the jetty or causeway was proved; that the taking, user, destruction, or obstruction of the jetty or causeway, was not a matter in respect of which the plaintiff was entitled to compensation, and that in awarding compensation in respect thereof, the umpire exceeded his jurisdiction; that the umpire awarded compensation in respect of some one or more matters, in respect of which he had no jurisdiction to award compensation; that the injurious affecting of the premises in respect of which the umpire made his award, was not proved at the trial, nor was the plaintiff's right or title to recover compensation in respect thereof, proved; that the verdict was against the evidence; and that the Lord Chief Baron misdirected the jury, in telling them that on the evidence given the plaintiff was entitled to the verdict and full benefit of the award.

There was no cross rule on the ground of the improper reception of evidence, but the umpire's evidence was admitted, subject to the opinion of the Court. If admissible and relevant, it was to be considered; if inadmissible, it was to be struck out. It was arranged that the demurrer should be brought on at the same time with the rule.

May 23, 25. *Mellish, Q.C.* (*Dering* with him), in support of the demurrer to the fourth plea (which the Court elected to dispose of first). In order to uphold the plea, the defendants must go the length of saying that the substitution of a roadway for the river access cannot under any circumstances be an "injuriously affecting" of the plaintiff's premises, under the Lands Clauses Act, 1845, s. 68, in such a sense as to entitle him to compensation. This contention would be untenable in any case, but more especially where, as here, a part of the claimant's property, viz. his interest in the causeway, is alleged in the declaration to have been taken by the defendants, and where therefore, he is entitled to claim for many inconveniences which would not have been actionable, and could not have been made matter for compensation, if none of his property had been taken: *Re Stockport Railway Company.* (1)

(1) 33 L. J. (Q.B.) 251. 10 Jur NS 664

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Philbrick (*Hawkins, Q.C.*, with him), contrà. The plaintiff is not legally entitled to compensation in respect of the matters mentioned in the fourth plea, and the fact of the causeway (over which he enjoyed a right of passage merely), being taken, makes no difference to his right in this respect. Then, if this be so, the sum awarded being indivisible, the award is vitiated, and the plaintiff cannot recover in an action upon it. Again, the declaration itself is defective, because it does not aver the plaintiff's interest in terms sufficiently precise to justify the award by the umpire, of the several items of compensation which make up the total sum awarded.

Mellish, Q.C., was not called on to reply.

THE COURT (Kelly, C.B., Martin and Channell, BB.), were clearly of opinion that the declaration was good and the fourth plea bad, and gave judgment for the plaintiff on the demurrer accordingly.

May 25, 26. *Mellish, Q.C.*, and *Dering*, shewed cause against the rule. 1st, the plaintiff made out a sufficient title to the causeway. He was in fact the owner of it under the lease of 1810. It is not demised in terms, but the general words used are large enough to include it, and the use of it was proved to be exclusively that of the plaintiff. The soil of the causeway therefore passed to the plaintiff, being enjoyed by him as part and parcel of the premises demised. Then this case falls within the principle laid down by Crompton, J. in *Re Stockport Railway Company.* (1) A part of the plaintiff's property was taken, and that lets him in to claim for the destruction of the privacy of his house and for kindred matters, which possibly, if no land had been taken, would not have been proper subjects for compensation. Or again, supposing the lease of 1810 conferred on the plaintiff an easement only, the principle of Crompton, J.'s judgment still applies. The causeway, whether the plaintiff actually possessed the soil of it or only an easement over it, had a value to him. Taking the lease and the evidence together, the Court should find as a fact that it was a part of the premises. It was used only by the lessees, and

(1) 33 L. J. (Q.B.) 251. 10 Jur NS 614

repaired at their sole expense. But even if the plaintiff had a mere easement over it, the award was right. He had a right of access to a public navigable river from premises which adjoined the river, and the defendants who could not have constructed the embankment except under the authority of an act of parliament, must make compensation for all the consequences naturally flowing from the obstruction made by them.

Secondly, the inquiry into what were the components of the total awarded, ought not to have been entered on. The award is good on its face. It is for two things: 1st, the obstruction of the causeway in which the plaintiff had an interest either as its owner or as an adjoining occupier, with an easement over it (and in his notice he claims in the alternative), and 2ndly, for the injurious affection of his premises. Now, he certainly had an interest of some sort, capable of being the subject of compensation in the causeway; and the judgment of the Court in the demurrer shews that his premises might be, and the facts shew that they were, injuriously affected. Here, therefore, is a clear case of a good award made primâ facie concerning matters within the umpire's jurisdiction. That being so, he ought not to have been called to prove how he had arrived at the sum awarded; in other words, to say what was passing in his own mind. Such evidence is inadmissible.

[Bramwell, B. (who was not present at the argument of the demurrer.) Suppose two persons agree to refer matters, A. and B., to an arbitrator; and he makes an award reciting that they were so referred to him, and giving, say, 100*l.* "of and concerning the premises." You contend that he cannot be called to prove that he really included matter C. in making his award, and gave 20*l.* in respect of it?]

Certainly not. If such a course could be adopted no award would be safe, especially where the arbitrator was a layman. He might be right in the result, but his account of the way he came to a conclusion would be sure to give rise to legal objection.

[Kelly, C.B. This is not a case where the umpire made an award concerning a matter wholly beyond his jurisdiction. His evidence was sought by the defendants to shew that he acted on a wrong impression as to a matter within his jurisdiction.]

It is alleged that he exceeded his powers, and made compensation in respect of matters over which he had no jurisdiction to award it. But that is no objection to the award: In *Mortimer* v. *South Western Railway Company* (1), it was held that a jury's excess of jurisdiction was no answer to an action on a judgment, and the same rule applies to an arbitrator.

[Channell, B. The real point is this: Can you contradict an award or vitiate it by oral evidence? It would be a very broad proposition to assert that you can never do so.]

Evidence consistent with the award may be given; but nothing inconsistent with its being a good award is admissible. Upon both grounds, therefore, the rule should be discharged. The umpire's evidence was not admissible, but if admissible it only confirmed the award.

Hawkins, Q.C., and *Philbrick*, in support of the rule. The umpire's evidence was not offered to vary the award but to avoid it altogether. The case differs from that put by Baron Bramwell, for this was a compulsory reference under the Lands Clauses Act, 1845, and the award is open to the same objection as the inquisition of a jury (25 & 26 Vict. c. 93, s. 23), which could be set aside if they exceeded their jurisdiction: *Read* v. *Victoria Station and Pimlico Railway Company* (2), which disposes of the case cited, *Mortimer* v. *South Western Railway Company*. (1) An arbitrator cannot by carefully wording his award give himself jurisdiction; nor can the award be sent back to him that he may divide it: see per Erle, C.J., and Willes, J., in *Re Newbold* v. *Metropolitan Railway Company* (3); Russell on Arbitration, 3rd ed. p. 467. Then if the award may be shewn to be absolutely void by extrinsic evidence, the arbitrator or umpire is as competent a witness to shew it as any one else. Again, there was no proof of structural damage at the trial, although it was expressly traversed. [*Mellish, Q.C.*, objected that this point was not taken at the trial. If it had been he was perfectly prepared to have proved structural damage.] It was part of the plaintiff's case to prove it.

[Kelly, C.B. I do not think this point can be made now. Although the umpire's evidence shewed he had given a small

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(1) 1 E. & E. 375; 28 L. J. (Q.B.) 129.

(2) 1 H. & C. 826; 32 L. J. (Ex.) 167.

(3) 14 C. B. (N.S.) 405, at p. 410.

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amount for structural damage, I do not think under the circumstances that the plaintiff was bound to prove it had actually occurred unless he was challenged to do so. It was not necessary at the trial to go through every item which the umpire had gone through before. The contest, substantially, was not whether this or that damage had in fact been done, but whether or not the umpire had awarded compensation on correct principles.]

Thirdly: the plaintiff failed to prove his title sufficiently at the trial, and as this was a matter into which the umpire could not inquire, he should have proved it absolutely: *Reg.* v. *London and North Western Railway Company.* (1) The notice described the plaintiff as owner of the jetty for a fixed term, and there was no evidence that he had that term, or indeed had anything beyond an easement over it. The words of the lease are incapable of conferring any right in the soil to him. Moreover, the Crown cannot grant the soil of a navigable river in derogation of a public right.

[BRAMWELL, B. The jetty is claimed in two ways: first, by the plaintiff as owner of the soil, and, secondly, by him as possessing an easement.]

Nothing but ownership of the jetty could entitle the umpire to award any sum in respect of loss of "amenity." The principle of Crompton, J.'s decision in *Re Stockport Railway Company* (2), only applies where a part of a man's land is taken. Here no land was taken, and the ordinary rules which govern the assessment of compensation for "injurious affection" apply. This being so, the umpire was wrong in giving anything for loss of prospect or loss of privacy: *Penny* v. *South Eastern Railway Company* (3); *Ricket* v. *Metropolitan Railway Company* (4); although possibly those injuries might furnish a cause of action.

KELLY, C.B. This is an action to recover the sum of 8325*l.*, alleged to be due under an award made in pursuance of the provisions of the Lands Clauses Act, 1845. The Duke of Buccleuch, the plaintiff, had a certain interest under a lease and two agreements in a mansion in Parliament Street, the back of which is parallel to and bounded by the river Thames; and the Metropolitan Board of Works, the defendants, had constructed an embankment between the back of the plaintiff's premises and the river. For the purpose of constructing it, the Board of Works found it necessary to remove the area or mass of water which formerly used to run at the back of the premises between high and low-water mark, and also to annihilate or take away a causeway or jetty, running from the foot of some stairs on the plaintiff's land across the shore to low-water mark. The plaintiff, in consequence, made a claim, which we find, from the notice he gave to the defendants, from the award, and from the evidence given on the trial by the arbitrator, was twofold: first, for the annihilation of the jetty and landing-place; and, secondly, for the taking away of the water which used to flow along the eastern or river side of the premises. These claims having been made, the arbitrator awarded 8325*l.* in respect of them, and, on being called to state in detail how that sum was made up (I assume for the present that his evidence was properly admitted), he said that 200*l.* was given for the mere loss of the jetty as a landing place, and 8125*l.* for damage arising from the premises being injuriously affected by the execution of the defendants' works, and the question we have to consider is, whether this verdict in an action on that award can be sustained. The whole sum is given as damage done to the plaintiff's premises, arising either from the taking away of the jetty, or the water, or from both causes.

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(1) 3 E. & B. 443; 23 L. J. (Q.B.) 185.

(2) 33 L. J. (Q.B.) 251. 10 Jur N.S. 614

(3) 7 E. & B. 660; 26 L. J. (Q.B.) 225. 3 Jur N.S. 358

(4) Law Rep. 2 H. L. 175, 187.

Many objections have been made to the award, and it must be conceded that, as the award was for one entire sum, if any part of that sum was given contrary to law, the whole award is invalidated. No doubt, if the umpire is shewn, by properly admissible evidence, to have included in his award subjects of compensation which he ought not to have included, inasmuch as the plaintiff was not entitled to recover in respect of them, and thus to have exceeded his jurisdiction, the award is bad. We must, therefore, consider in detail, for what kind of damage the umpire has given this amount. Now, first of all, it is said that the claim is founded on a notice alleging an ownership of the premises and causeway for a fixed term, whereas the duke was not owner for that term absolutely, and, indeed, not "owner" of the causeway at all. But, in fact, the notice is not of a claim in respect of any particular legal interest or easement in or over the jetty. When looked at in conjunction with the lease and agreements under which the plaintiff asserts his interest, we find no absolute ownership claimed. The notice refers to the lease, &c., and on looking at these instruments we find the real nature of the claim to have been one for the residue of a term of ninety-nine years, which the Crown contracted to grant when 20,000*l.* had been laid out on the premises. The umpire, we must take for granted, was well aware of this, for the instruments were before him, and he must have satisfied himself that the money was laid out which gave the plaintiff a right to have the term granted to him. In fact, there could be little doubt that that sum at least had been expended. If, then, in making his award, he treated the plaintiff's interest in the term as absolute, he did no more than substantial justice, for the plaintiff had done all that was necessary to enable him to call on the Crown to make his interest absolute.

But, further, the defendants contend that by the terms of the notice, of the declaration, and of the award, the plaintiff is claiming as *owner*, whereas at most he is entitled to an easement over the causeway only. It is not necessary to determine this point, but I myself should not hesitate to say that the soil had actually been granted. Under the lease of 1810 we find that there was granted not merely "all ways and passages," &c., but also "all easements, waters, water courses, and appurtenances thereto belonging, or with any part thereof, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part or parcel thereof," and I do not see why we should not hold that under the term "way," with the words superadded, "held, used, occupied or enjoyed," &c., the soil of the way passed. Doubt, however, may be entertained on this point, and although therefore there was evidence that the plaintiff had a right to the soil of the way, I do not decide the question. If an easement only were granted, the question remains, whether it was not a proper subject of compensation under this umpirage, and whether it was not properly treated by the umpire. Now the terms of the notice are large. Not only is the duke described as the "owner" of this causeway, but he also claims as "being entitled to the use and enjoyment of it, and of

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the easements, rights, and privileges belonging thereto or connected therewith." This notice was before the umpire, and very possibly he considered that the plaintiff had an easement only when he made his award. I see no distinction between the case of the plaintiff being owner and of his having an easement only, so far as the question of valuing his interest is concerned. He had an exclusive right over the causeway of some sort, and whether it was an exclusive right of passage or to the soil seems to me, for the purposes of this award, immaterial. It is clear that the plaintiff, and he alone, had the only beneficial use which could be made of the soil, and, moreover, he had from time to time, and once at a considerable cost, repaired the jetty. When estimating its value to him, therefore, what does it signify whether he had the soil or not? I am of opinion that we need not decide which sort of interest he had, for in either case the same compensation might be legitimately awarded. Some interest in the plaintiff was established before the umpire, and at the trial, and therefore this objection, which in form was that there was no evidence of title, fails.

Suppose, then, that the jetty was the duke's, or that he had an easement over it, and suppose, further, that he was therefore entitled to damages for its being injuriously affected, it is still objected that the umpire has made an improper award, since he has not made it in reference to the jetty and the taking away thereof. But it is perfectly consistent with the award, which is good on its face, that the whole damage might have been considered by the umpire to flow from the taking of the jetty alone, and nominal damages only for the injuriously affecting of the premises. The language used is as follows: "Compensation for the interest of the said Duke of Buccleuch on the said causeway, pier, and jetty, and for shutting up the said landing-place, and for the damage by the depreciation of the said mansion-house, &c., by the otherwise injuriously affecting the same." And we now approach the question of the admissibility of the umpire's evidence to explain the award. The defendants contended that the umpire might be called at the trial to prove how the sum he awarded was made up, and they further say that his evidence shewed that much was awarded in respect of subjects for which the plaintiff was not entitled to recover. It is

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really unnecessary to decide whether the evidence was admissible or not, for I am of opinion that it was irrelevant, or that so far as it was relevant it supported the award. However, as the question of admissibility has been fully argued, I may say that in my judgment it is properly admissible. I think it is open to a defendant to shew that the sum awarded by an arbitrator includes an amount for something over which he had no jurisdiction. Suppose, for example, that an arbitrator were empowered to give compensation for injury to a house numbered "one" in a particular row of houses, and he professed to award such compensation, although in fact the whole evidence before him related to injury to a house numbered "two," and his award really was made for injury to that house. Can it be doubted but that this circumstance might be proved by the defendant on the trial of an action on the award, and if so, I see no reason why it should not be proved by the evidence of the umpire himself. I am therefore of opinion that in this case the umpire's evidence was admissible. Then, this being the law, we have to consider what he actually proved, and the effect of his evidence was this: that the claim was twofold, viz., for annihilating the jetty and taking away the access by water, and substituting an embankment intended hereafter to be used as a public highway. This being the claim the umpire had to consider whether these works, executed as they were under parliamentary authority by the defendants, injuriously affected the plaintiff's premises.

Now, I accept as the test the possibility there would have been of maintaining an action against any one who had done the acts complained of without authority, and I am clearly of opinion that the plaintiff would have been entitled to bring an action against a person who should have deprived him of the mass of water flowing along the back of his premises just as much as he would against anybody who took away the public road in front of the house in Whitehall. There are many cases, no doubt, in which an obstruction of a highway is an injury to the public only, and for which no individual can maintain an action. But there are others, where one who is especially damaged may maintain an action, and I think this case is one of them. Suppose, for example, the plaintiff had been a coal-merchant, with a wharf where the garden is,

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and using the river to bring his merchandize to his wharf; if his means of water access were taken away, it cannot be doubted he would be able to maintain his action. Then, this being so, why is he not entitled to compensation against the defendants who, under their act, have destroyed his water access? It has been said that there are cases where there might be an action, but no claim for compensation; but I am myself at a loss to conceive what they can be. The right to an action and the claim for compensation seem to me to be co-extensive. It is further said that the question of injury ought to have been left to the jury; but if the proceedings of the defendants would, in the absence of statutory powers, have founded an action, and therefore did found this claim, there really was nothing to leave to them, except whether the defendants actually had done the works complained of as to which there was no dispute. But it is also objected that the umpire, according to his own evidence, has given a certain amount for loss of privacy or "amenity" to the house, and that he had no right to give anything for such a head of claim. This may, perhaps, be the case; but when the evidence is looked at, it amounts, so far as it is relevant, only to this, that the umpire has found that by reason of the substitution of the proposed highway for the water the premises were injuriously affected; and from this point the evidence seems to me to be irrelevant. Once establish that the defendants have taken away the area of water, and you have an act proved to have been done whereby the plaintiffs were affected injuriously, and all the rest of the evidence is merely on a question of amount. The umpire was called to say how much and for what he gave certain sums, and, taking a great number of circumstances into consideration, he arrived at 8325*l.* In my judgment, however, his evidence on this question, it being one purely of amount which was for him to decide, is irrelevant even if it were properly admissible.

55 [illegible] 193

But if I were called on to consider these various items, I should hold that they were rightly awarded. It cannot be that the plaintiff is entitled to the same damages only, no matter whether something agreeable or convenient has been substituted for the former condition of his premises, or something such as a bank of mud, for example, which may be the subject of daily and

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hourly annoyance. It seems to me that a jury or the umpire may well take in account the new state of the premises when the fact of their being in some way injuriously affected is established. The substance of this case, then, is really this:—The defendants have taken away the causeway and the water access. Both acts would have furnished causes of action, and are the proper subjects of compensation, and the plaintiff claims in respect of both. The umpire has settled the amount of damage flowing from one or other of these acts, or from both, and I do not think the verdict in this action on his award ought to be disturbed.

As to the sum of 50*l.* given for structural damage to the kitchen, it really falls within the previous observations, because the injury to the kitchen may be treated as an "injurious affection" of the premises. But I do not put my decision about it on that ground simply. The umpire, in his evidence, stated, among the details he gave, that 50*l.* was for this damage, and the defendants now say that no evidence was given at the trial of its having occurred. The plaintiff certainly did not prove it; but this objection should have been taken then, so as to give him an opportunity of doing so. The defendants, however, did not take it, and they cannot avail themselves of it now. This rule must therefore be discharged.

MARTIN, B. I am of the same opinion. This was an action on an award made by an umpire duly appointed under the Lands Clauses Act, 1845, whereby the sum of 8325*l.* was awarded to the plaintiff, and I will assume that the pleadings raise every possible defence available to the defendants, and therefore that the case may be determined on the merits. The evidence at the trial was, that the plaintiff was under various documents the proprietor of Montagu House, Whitehall, and of soil granted to him on the banks of the river Thames. It was also proved that for more than forty years there had been a staircase on the premises demised, from the foot of which ran a causeway or jetty into the river. His interest in the causeway, I think, was an easement, and not a right to the soil of it. The defendants destroyed this jetty, and removed the water frontage, substituting for it an embankment at a higher level intended for a highway, by which, no doubt, noise and dust and other inconveniences would be caused to the plaintiff's premises.

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The plaintiff claimed compensation accordingly, and in the result the umpire gave him the sum sued for. At the trial he was called as a witness by the defendants, to state what injuries they were for which he had given this sum. I am of opinion that he was a competent witness, and I see no difference between the case of an arbitrator selected by the parties voluntarily, and one to whom they are compelled by act of parliament to refer, and when any arbitrator is appointed to determine matters A. and B., and without authority determines C., that would in my judgment make the award void. But, then, can this be shewn by the evidence of the arbitrator or umpire himself? I think it can. It is true that a juryman would not be permitted to disclose what passed in the jury-box while a verdict was being considered, but the principles of public policy which exclude him do not apply to an arbitrator. It appears therefore to me that if two questions are referred to an arbitrator, evidence would be admissible to shew that although his award professed to deal with those two questions only, it really was made concerning a third, over which he had no jurisdiction, and I see no reason why he should not himself be able to prove that fact, which would vitiate the award. In this case, however, the umpire's evidence seems to me to confirm the award. Every head of damage would, in my opinion, have been recoverable in an action, if the defendants had not acted under an act of parliament, and is therefore, I think, a legitimate subject of compensation.

BRAMWELL, B. I think that this rule ought to be discharged, but not on the same ground, for I am of opinion that the evidence of the umpire was not admissible. Even in the case put by my Brother Martin, I should be inclined to think that it could not properly be admitted. Where matter A. and matter B. are referred to an arbitrator, and he makes his award "of and concerning the premises," I incline to think, though on this point I do not feel a confident opinion, that no evidence could be admitted to prove him really to have dealt with matter C., which was not within his jurisdiction. But that is not the present case, because here the umpire was clearly acting within his jurisdiction. There was, first, a claim in respect of the jetty, and in my judgment the claimant is not to be absolutely tied up by the nature of the inte-

5 HL 42
437.

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rest he claims in his notice, possessory or otherwise, any more than he would have been tied up if he had misstated the length of term for which he claimed compensation. I think the soil of the jetty did not pass, but the plaintiff had a claim to it, or easement over it, in respect of which he was entitled to compensation when the jetty was destroyed. He was also entitled to something for the injury done to his premises by the taking away of the water-way, 5 Ex 223-4 no other being substituted—for between the new way and the plaintiff's premises was a piece of land which the plaintiff might but which he was not bound to take—and, indeed, if a roadway had been substituted, the same thing would be true. Therefore, here were two matters in respect of which the umpire had power to adjudicate. Suppose he gives some sum which he ought not to have given, by way of damage flowing from one or other of these acts of the defendants,—I do not think his award can be overhauled for that reason, for the amount is, to use an expression which often was used by Lord Campbell, entirely within his arbitrium. I prefer to decide the case on this ground, and not on the ground that the principles of the judgment of Crompton, J., in *Re Stockport Railway Company* (1) apply to this case, although, I need not say, he was a judge for whose opinion I have a profound 5 Ex 250 respect. For to me it does seem strange that the taking of a piece 2 HL Sc-Div of a man's land, or even the blocking of one of his lights, should let him in to prove all sorts of damage for which he could not 5 HL 426 otherwise recover. I should pause before I assented to such a proposition.

CHANNELL, B. I am of the same opinion, and have but little to add to what has fallen from my Lord and my learned brethren. I agree that the defendants have put everything in issue; and after hearing the arguments on the rule, I am satisfied more than ever that the Court came to a right conclusion on the demurrer. Now at the trial, the plaintiff made a primâ facie case, and the award was good on the face of it. Then the onus of proof was shifted, and we have to inquire how the defendants sustained that onus. First, they called the umpire himself; and I am of opinion his evidence was admissible. I am quite disposed to uphold to

(1) 33 L. J. (Q.B.) 251, 10 Jur NS 1014

its utmost extent the rule of not contravening, by parol evidence, the contents of a written instrument. But here the evidence was not offered merely to explain the award, but absolutely to destroy it, by shewing it to have been made in respect of matters not within the umpire's jurisdiction. It was received subject to objection, and if, therefore, the Court deems it inadmissible, it must be struck out. If it was admissible, but is irrelevant, the case is not prejudiced. I think, as I said, it is admissible, but that the defendants' argument on it cannot be sustained. As to the contention that the 50*l.* damage shewn by the umpire to have been given for structural injury to the kitchen ought, after the evidence given by the umpire, to have been proved, I do not think it open to the defendants. Had the point been taken directly at the trial, the question might have been different; but it cannot be raised now, not having been made then.

Upon another matter I have entertained some doubt, but have now satisfied myself on it. I think the decisions are sound, that neither an umpire nor a compensation jury are to try questions of title. They are to try *value* alone. Although, therefore, I thought at first that it was of no consequence if the interest proved was other than that claimed in the notice, I do not feel so sure about that now. I am not prepared to say, that if there was a claim for ninety years, or an interest commensurate with it, and on the trial every traverse being taken, it was proved that the interest was only for eighty years, and not ninety, that that would not be fatal to the plaintiff's title to recover. But that is not this case, for here all the plaintiff does is to claim some interest under the lease and the agreements. It may be equitable or legal; all he says is, that his interest, such as it is, is for the residue of a term of ninety-nine years. Then, again, with regard to the evidence of the allegation of interest, when the terms of the notice and the pleadings are looked at, with the lease and the agreements, there does not appear to me to be any failure of proof. In other words, there is no evidence that the plaintiff was entitled for a less period than that specified in the notice, to some interest or other. Whether it was possessory, or an easement only, over this jetty, I do not say. It was, in my opinion, for the reasons given in the judgments of my Lord and my Brother Martin, an interest suffi-

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cient to entitle the plaintiff to the compensation awarded to him. The rule must, therefore, be discharged.

Rule discharged.

Attorneys for plaintiff: *Nicholl, Burnett, & Newman.*
Attorney for defendants: *The Solicitor to the Metropolitan Board.*

June 12.

THE GENERAL STEAM NAVIGATION COMPANY *v.* THE BRITISH AND COLONIAL STEAM NAVIGATION COMPANY, LIMITED.

Ship and Shipping—Negligence—Collision—Compulsory Pilotage—Master and Servant—Port of London—Merchant Shipping Act, 1854 (17 & 18 *Vict.* c. 104)—*General Pilot Act* (6 *Geo.* 4, *c.* 125).

2 PC 526–9
6 QB 638
4 A.E 168
2 PD 165
4 PD 200
202
7 PD 133

All vessels coming up the Channel to London are required by s. 378 of the Merchant Shipping Act, 1854, to take a pilot on board at Dungeness, and to put him in charge of the ship.

From Dungeness to London Bridge is, by s. 370, constituted the Trinity House pilotage district; but no pilot can be licenced to conduct ships both above and below Gravesend; and the pilotage rates are rates from Dungeness to Gravesend, and not to any intermediate place.

By s. 59 of 6 Geo. 4, c. 125 (the exemptions of which are retained by s. 353 of the Merchant Shipping Act, 1854), vessels being within their own port are exempted from compulsory pilotage.

The defendants' vessel coming up the Channel to London, took a pilot on board at Dungeness; before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with the plaintiffs' vessel through the pilot's negligence. The defendants' vessel belonged to the port of London, and if the port extends to Yantlett Creek she was at the time of the collision within her own port; if it only extends to Gravesend, she was not within her own port:—

Held, per Martin, Bramwell, and Channell, BB. (Kelly, CB., dissenting), that, even assuming the vessel to have been within her own port at the time of the collision, yet the pilot having been compulsorily taken on board and put in charge of the ship, and his duty as pilot not having ended, he was not the servant of the defendants, and they were not therefore liable for his negligence.

Lucey v. *Ingram* (6 M. & W. 302), followed.

Per Kelly, C.B., and Channell, B., for pilotage purposes the port of London extends from Staines to Yantlett Creek.

Per Martin and Bramwell, BB., it extends only from London Bridge to Gravesend.

Affd — Ex Ch. 4 Ex 238

SPECIAL case. The action was brought for damage done in a collision on the Thames at a point between Gravesend and Yantlett Creek, by the defendants' vessel *Thames*, proceeding up the river, to the plaintiffs' vessel *Stork*, proceeding down the river. The defendants pleaded: 1. Not guilty. 2. Compulsory pilotage.

The action was tried at Guildhall before Pollock, C.B., at the sittings after Hilary Term, 1866, and on the issue of not guilty a verdict was found for the plaintiffs, leave being reserved to the defendants to move to enter a nonsuit or a verdict for them on the second plea. A rule was obtained by the defendants pursuant to leave reserved, and also for a new trial on the ground that the verdict was against evidence. On the argument of the rule the Court reserved judgment on the second branch of the rule, in order that the opinion of the Court might first be obtained on the matters raised by the second plea; and afterwards, pursuant to an order made by Bramwell, B. with the consent of the parties, this special case was stated.

On the 15th of December, 1865, the defendants' steamship *Thames*, a vessel belonging to the port of London, of more than sixty tons burden, and carrying passengers, arrived off Dungeness on her way from Quebec to a place within the London pilotage district. At Dungeness, pursuant to 17 & 18 Vict. c. 104, s. 378, the master took on board a duly qualified pilot, under whose charge and direction the vessel was placed. While the vessel was proceeding up the river under the charge of the pilot, at a point between Gravesend and Yantlett Creek, off Leigh, and close to the north shore of the river, she came into collision with the plaintiffs' ship *Stork*, then on her way out to sea, causing much damage to both vessels. For the purpose of the case, but not otherwise, it was to be taken that the collision was caused by the fault of the pilot, and that the plaintiffs' ship was not to blame.

The arbitrator, by whom the special case was settled, found that the limits of the port of London differed for different purposes; the eastern limit of the port being for some purposes Gravesend, for others Yantlett Creek, and for others an imaginary line drawn from the North Foreland to the Naze; and, if the question was one which he, as arbitrator, ought to determine, but not otherwise, he found that the port of London did not extend towards the east beyond Gravesend. (1)

The question for the opinion of the Court was, whether under

(1) The arbitrator also stated that no oral evidence on the question was adduced on either side, and that the authorities cited before him were all to be found in works accessible to the public.

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the above circumstances, the defendants were protected from liability for the damage done to plaintiffs' ship? If the opinion of the Court should be in the affirmative, judgment was to be for the defendants; if in the negative, the Court was to consider further whether the rule for a new trial should be made absolute or discharged.

The material acts and sections are as follows:—

17 & 18 Vict. c. 104 (the Merchant Shipping Act, 1854), s. 370. "The Trinity House shall continue, after due examination by themselves or their sub-commissioners, to appoint and licence under their common seal, pilots for the purpose of conducting ships within the limits following, or any portion of such limits (that is to say):

"1. The London district, comprising the waters of the Thames and Medway, as high as London Bridge and Rochester Bridge, respectively, and also the seas and channels leading thereto or therefrom, as far as Orfordness to the north and Dungeness to the south; so nevertheless, that no pilot shall hereafter be licenced to conduct ships both above and below Gravesend.

"2. The English Channel district, comprising the seas between Dungeness and the Isle of Wight.

"3. The Trinity House outport districts, comprising any pilotage district for the appointment of pilots within which no particular provision is made by any act of parliament or charter."

Section 376 provides that "subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district, and the Trinity House outport districts, as hereinbefore defined;" and it imposes a penalty on any master who, without procuring a certificate enabling him to do so, himself pilots his ship, or employs an unqualified person to pilot her, within any part of these districts, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose.

Section 377 provides for the supply of qualified pilots by the Trinity House to ships coming from the westward past Dungeness.

Section 378 provides that "subject to any alteration to be made by the Trinity House, every master of any ship coming from the westward, and bound to any place in the rivers Thames and Medway (unless she has a qualified pilot on board, or is exempted from compulsory pilotage), shall, on the arrival of such ship off Dungeness, and thenceforth until she has passed the south buoy of the Brake, or a line to be drawn from Sandown Castle to the said buoy, or until a qualified pilot has come on board, display and keep flying the usual signal for a pilot; and if any qualified pilot is within hail, or is approaching and within half a mile, and has the proper distinguishing flag flying in his boat, such master shall, by heaving to in proper time or shortening sail, or by any practicable means consistent with the safety of his ship, facilitate such pilot getting on board, and shall give the charge of piloting his ship to such pilot;" the section makes further provision for the case of two pilots offering themselves, and imposes a penalty on any master not keeping the signal flying, not facilitating the pilot's getting on board, or not giving to the pilot the charge of piloting the ship.

Section 388:—"No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

With respect to exemption from compulsory pilotage:—

Section 379 enacts that "the following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts (that is to say) . . . . 2. Ships of not more than sixty tons burden. . . . 5. Ships navigating within the limits of the port to which they belong."

Section 353:—"Subject to any alteration to be made by any pilotage authority, in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall continue in force."

By 6 Geo. 4, c. 125, s. 59, "the master of, &c., or of any other ship or vessel whatever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place

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in relation to which particular provision hath heretofore been made by any act or acts of parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this act imposed, conduct or pilot his own ship or vessel, when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicenced pilot or other person or persons than the ordinary crew of the said ship or vessel."

A charter of the reign of James II., granted to the master wardens and assistants of the Trinity House of Deptford Strond, and their successors, the appointment of pilots, to and for the bringing in and carrying forth of the river of Thames, or any other creek belonging or running into the same, of ships and other vessels; and prohibited all persons not so appointed and authorized from acting as pilots.

May 27, June 1. *Pollock, Q.C.* (*M. Chambers, Q.C.*, with him), for the plaintiffs. The defendants' vessel was carrying passengers, and therefore was not within the exemption in s. 379 of 17 & 18 Vict. c. 104; but it is decided by the cases of *Reg.* v. *Stanton* (1), *The Earl of Auckland* (2), and *The Stettin* (3), that s. 353 of the Merchant Shipping Act, 1854, preserves entire the exemptions which were contained in 6 Geo. 4, c. 125, s. 59. Therefore, assuming the port of London to extend to Yantlett Creek, and therefore to include the spot where the collision took place, the defendants' vessel being then within her own port, was exempt from compul-

(1) 8 E. & B. 445. 4 Jur N S 332

(2) 1 Lush. 164, 387.

Pol 350 (3) Brow. & Lush. 199; 31 L. J. (P. D. & Ad.) 208. The *Stettin*, a vessel belonging to the port of London, and inward bound from Bordeaux, whilst under the charge of a licenced pilot, came into collision with another vessel in the Thames, off the Regent's Canal at Limehouse. In the Court of Admiralty, Dr. Lushington held the *Stettin* to be exempted from compulsory pilotage under the General Pilot Act (6 Geo. 4, c. 125), s. 59, as "being within" her own port, and her owners, therefore, to be liable for the collision; but he doubted whether she would have been exempted under 17 & 18 Vict. c. 104, s. 379, as "navigating within" her own port, and expressed an opinion to the contrary. The Privy Council affirmed the judgment (p. 203), not expressing any opinion on the construction put by Dr. Lushington on the General Pilot Act, s. 59, but holding that the words "navigating within" in s. 379 of the Merchant Shipping Act, 1854, were equivalent to "being within," and that the *Stettin* was, therefore, within the exemption of that section.

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sory pilotage, unless London is a port with respect to which provision has been made for the appointment of pilots by some act or charter. The case of *The Stettin* (1) also removes this exception, since in that case it must be taken to have been decided that there was no such act or charter applicable to London; and the charter of James II., which is the only document of the kind in the case, is not a regulation of the pilotage of the port of London as such, and therefore not within the statute. The real question therefore is, what are the limits of the port of London? Lord Hale's definition of a port in his De Portibus Maris, c. 2, p. 46, gives the test by which a port is to be determined; he distinguishes between the port of London proper extending to Greenwich, and Gravesend as a member of the port; and his list of ports includes under "London cum membris," Blackwall, Gravesend, and Lee. There can be no doubt that Gravesend is now reckoned within the port of London, similarly ought Lee to be so reckoned, off which the collision took place. The limits of the port are the same with the limits of the conservancy jurisdiction; and these have always been Staines and Yantlett. These are shewn by an inquisition, De Mensuratione Bladi et Salis, held in the 29th year of Edward I., and contained in the Liber Albus (ed. Riley, 1859), pp. 241—244 (Riley's Trans. of the White Book, 1862, p. 213), where a uniform corn and salt measure is stated as prevailing between London and La Zenlade, which is the same with Yantlett. Again, at p. 500 of the Liber Albus (Riley's Trans., 1862, p. 429), an account is given of the prosecution and amercement, in the 21st year of Henry III., of certain fishermen for using "kidellos" within the liberties of London, "ultrà Yenlande versus mare," (that is, just beyond the limits, and therefore in fraud of the city liberties,) contrary to the charter of John and the Great Charter.

[CHANNELL, B., referred to *Fazakerly* v. *Wiltshire* (2), where Pratt, C.J., relies on the admission by the Attorney-General against the interest of the Crown, that the jurisdiction of the city of London extends from Staines Bridge to Yendal, in Kent. (3)]

To the same effect is the observation of the Solicitor-General in

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(1) Brow. & Lush. 199; 31 L. J. (P. D. & Ad.) 208.

(2) 1 Str. 462.

(3) At p. 469. See Coke's Entries, 535b, 537a.

Williams v. *Marshall* (1), and the Attorney-General in *Dagleish* v. *Brooke* (2), at least so far as to show that the port extends beyond Gravesend; in *Brereton* v. *Chapman* (3), Tindal, C.J., states it to extend to Yantlett Creek, and it is so laid down in 1 Rolle Abr. p. 557, O. 6. No other limit can be discovered, and this is accepted as the commonly known terminus in M'Culloch's British Empire, vol. i., pp. 61, 62; and in Pulling's Customs of London, c. 19, p. 320. To the same effect is Maitland's History of London (compiled from Strype, Stow, and other sources), ed. 1756, vol. i., pp. 58, 60, 61; a charge delivered in 1616 to the Court of Conservancy by Serjt. Thomas Jones, the common serjeant, is there cited, in which reference is made (amongst other documents) to a charter of James I., dated August 20th, 1605 (see Pulling's Customs of London, p. 322), expressly defining the conservancy jurisdiction of the city as extending from Staines to "Kendall, otherwise Yenland, otherwise Yenlett;" and to an act of 4 Hen. 7, c. 15, in which the same limits are declared; see also, at pp. 66, 67, *Item* 18, of an order by Sir Robert Ducie, Lord Mayor in the reign of James I., regulating the fastening of barges, &c., in the Thames between the same points. On the north shore the limit of the civic jurisdiction, according to Griffiths's Conservancy of the Thames, p. 51, is at the Crow Stone, two miles below Leigh. For customs purposes the port extends farther. The 13 & 14 Car. 2, c. 11, s. 14, directs the issue of a commission to assign ports of lading and discharge (see proceedings of the commission in Pulling's Customs of London, p. 355); the commission set out a line from the North Foreland to the Naze in Essex as the limit of the port for customs' purposes; but it must be admitted that the port of London proper never extended to this line. The 10 Geo. 4, c. cxxiv., and the Report on the Port of London, 1836, only relate to the docks and the Pool, and throw no light on the question of the limits of the port. All the evidence pointing to Yantlett Creek as the limit of the port, it lies on those who maintain that the limit for pilotage purposes is different, to point out and prove where that limit is. The only fact to be alleged in favour of Gravesend is that the change of pilots does, and for a long time has, taken place there. But that

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(1) 6 Taunt. at p. 391.

(2) 15 East, at p. 301.

(3) 7 Bing. at p. 562.

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is due only to the fact that Gravesend is a convenient place for changing pilots, while Yantlett is nothing but a mud bank.

Watkin Williams (*Sir J. B. Karslake, A. G.*, with him), for the defendants. It is not denied that for conservancy purposes (1) the port of London extends as far as Yantlett Creek. For certain customs' purposes, also, there is no doubt that the line drawn from the Naze to the North Foreland is the boundary; but that no reliance can be placed on that circumstance is shewn by the fact that the Treasury warrants issued under the Act of 13 & 14 Car. 2, c. 11, except from the district included within that line, the ports of Ipswich and Sandwich, with their members; but one of the members of the port of Ipswich was then Maldon, and the limits of the port of Maldon are defined by the Treasury warrant of Michaelmas Term, 32 Car. 2, as extending to the west of Leigh Road (see also Beawes Lex Merc. ed. 1813, vol. i., pp. 246, 249; Molloy De Jure Maritimo, ed. 1744, p. 291, ed. 1769, vol. ii. p. 181), which would include the place where the collision occurred (see also Strype's Stow, ed. 1754–5, vol. ii. p. 384). (2) But in truth the whole of this arrangement, from 1 Eliz. c. 11, downwards, was for customs' purposes only, and is so expressed in the Treasury warrant of 1856, which fixes the limits of the port of London. The extent of the civic jurisdiction over shipping is much less; it cannot include the whole of the district claimed as within their conservancy jurisdiction, for in the authorities cited that is said to include the waters of the Thames and the Medway, and would therefore include the port of Rochester itself, the shipping of which is not under the control of the city. It, in fact, stretches only from London Bridge to Bugsby's Hole, between Blackwall and Woolwich; see Pulling's Customs of London, pp. 331—336, 39 Geo. 3, c. lxix. ss. 35, 36, 37, and 10 Geo. 4, c. cxxiv. s. 6.

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(1) Now regulated by 20 & 21 Vict. c. cxlvii.; 27 & 28 Vict. c. 113.

(2) In a Treasury warrant of the 16th of April, 1823, the boundary of the port of Maldon is described as extending from Bilmeroy Creek, near Tilbury Fort, "along the boundary of the port of London," to one mile and a quarter from St. Osyth's Point, and thence W.N.W. to Tollesbury, "where the port of Colchester commences;" and it is similarly described in another Treasury warrant of the 4th of June, 1852 (Gazette, No. 21,325). In the description of the port in the Treasury warrant of the 15th of January, 1856, and the 15th of January, 1866, the reference to the boundary of the port of London is omitted.

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This limit would be a better indication of the probable extent of the port than either the conservancy jurisdiction or the customs' line. But the most probable limit of the port is Gravesend; that place is made the limit within which, by 39 Geo. 3, c. lxix. s. 135, ships navigating are to be exempt from the tolls imposed by that act. Gravesend is made by 1 & 2 Wm. 4, c. lxxvi. s. 23, the eastern limit of the coal dues; and it is the place at which vessels clear outwards, and where vessels entering the port of London are boarded by the custom-house officers (see *Williams* v. *Marshall* (1), Arnould Ins. 2nd ed., p. 636, ed. 1866, p. 558; Marshall's Ins. ed. 1861, p. 288, note z). That it is commonly regarded as the limit of the port for pilotage purposes is shewn by the regulations issued by the Trinity House, and dated the 5th of January, 1858, which provide, by r. 15, that where any vessel has passed "the pillar at the entrance of the canal at Gravesend, marking the boundary of the port of London," without a pilot, any pilot, though not in his turn, may take charge of her, to prevent her detention.

Secondly: assuming that the defendants' vessel was within the port of London, being her own port, at the time of the collision, that port is within the exception to the exemption in 6 Geo. 4, c. 125, s. 59, being a port, with respect to which special regulations have been made, both by charter and by act. The Trinity House were, by the charter of James II., and, according to the recital of the preamble of 48 Geo. 3, c. 104, had been at the date of that act, by usage, for more than three centuries, empowered to appoint pilots to conduct ships into, out of, and upon the river Thames (see Strype's Stow, ed. 1754–5, vol. ii.; p. 389); and those powers are confirmed by the successive acts of 8 Eliz. c. 13, 5 Geo. 2, c. 20, and 52 Geo. 3, c. 39, all previous to 6 Geo. 4, c. 125, which contains the section relied upon. It is not denied that this pilotage jurisdiction extended from London Bridge to the sea; even assuming, therefore, the port of London to extend from Staines to Yantlett, the Trinity House jurisdiction included all that part of the port to which pilotage was applicable, for no vessels pass beyond London Bridge except barges. Special pilotage regulations had therefore been made relating to the port of London previous to 6 Geo. 4, c. 125, and these provisions were continued by s. 2 of that act. With respect to the case of *The Stettin* (1), it decides nothing on this point; no act or charter being brought to the notice of the Court, no decision was or could be pronounced on the effect of any such act or charter.

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(1) 6 Taunt. 390; 7 Taunt. 468, 475.

Thirdly: even supposing the vessel to have been exempt from compulsory pilotage, yet the defendants are absolved from liability by s. 388 of 17 & 18 Vict. c. 104, inasmuch as the ship was within a pilotage district, where the employment of a pilot was compulsory by law. This clause of exemption must be construed together with s. 353, and with 6 Geo. 4, c. 125, s. 59; and so construed, it must mean that if a port and a pilotage district agree, then the exemption of s. 388 attaches; but if a port is partly within and partly without a pilotage district, the master who has compulsorily taken on board a pilot outside his port cannot discharge him until he has passed the pilotage district. Now, although from London to Dungeness is one pilotage district, in so far as it is all under the control of the Trinity House, it is, in fact, divided into two districts by the prohibition of a licence being given to the same pilot to conduct ships both above and below Gravesend (following the regulation of the Trinity House of the 19th of April, 1826: see Pulling's Customs of London, pp. 342, 343). Gravesend, therefore, is the place where (even assuming the port of London to extend farther seaward) the vessel entering her own port ceases to be in a district where the employment of a pilot is compulsory. The whole of the course up to Gravesend, where the pilot is universally discharged, and to which the pilotage rates are calculated, is one thing, and the pilotage having been compulsory originally, it continues to be so up to the proper point for discharging the pilot.

Pollock, Q.C., in reply, referred to *The Halley.* (2)

Cur. adv. vult.

June 12. The following judgments were delivered:—

MARTIN, B. In this case there is, unfortunately, a division of opinion in the Court. In the result of the judgment which I am

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(1) Brow. & Lush. 199; 31 L. J. (P. D. & Ad.) 208.

(2) Law Rep. 2 A. & E. 3; since reversed by the Privy Council. 2 PC 193.

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about to deliver my Brother Channell concurs, but will add some further observations; and my Brother Bramwell desires me to say that although, not having heard the whole of the argument, he does not propose to deliver judgment, yet so far as he has heard it he entirely agrees with us. But the Lord Chief Baron dissents.

There are two questions in this case:—First, what is the true meaning and operation of the exemptions from compulsory pilotage; and secondly, what are the limits of the port of London within the meaning of the same exemptions? The facts of the case are very simple:—The plaintiffs are the owners of a steam vessel called the *Stork*, which was in the course of a voyage at a place in the estuary of the Thames between Gravesend and Yantlett Creek. The defendants are owners of a vessel of more than sixty tons burden, belonging to, which means registered at, the port of London (s. 33 of Merchant Shipping Act, 1854), and which was on a voyage from Quebec to London with cargo and passengers, and which compulsorily took on board a qualified pilot at Dungeness to navigate the vessel to Gravesend. By his fault (as the jury have found) damage was done to the plaintiffs' vessel, and the question in the case will be, whether the defendants are responsible for it. By the ordinary rule of law an owner of a ship is responsible for the negligence of the master and crew; they are in contemplation of law his servants; he selects them and pays them, and is responsible for their misconduct in the course of the employment. But a pilot taken compulsorily is not a servant of the shipowner. He does not select him. By s. 378 of the act he is bound to take the first that offers, and, in the words of the statute, "shall give the charge of the piloting his ship to such pilot." He pays him a fixed charge made by authority of the statute, and is forbidden to pay either more or less, and in the present case he was under a legal obligation to pay him for navigating the ship from Dungeness to Gravesend: s. 333 (5), sched. Table U. Under such circumstances the shipowner would not be responsible for the fault of the pilot at common law — but there are also statutory provisions. The 6 Geo. 4, c. 125 (the old Pilot Act), by s. 55 enacts, that no owner shall be answerable for any damage which shall happen by reason of the default of the licensed pilot, acting in charge of the ship in pursuance of the provision of the act, when and so long as the pilot shall be duly qualified to have the charge of the ship. The Merchant Shipping Act, 1854, is divided into parts. The fifth relates to pilotage. This part commences at s. 330, and seems to be substantially the same as the 6 Geo. 4, c. 125. The 388th section enacts that no owner shall be answerable for damage occasioned by the fault of a qualified pilot acting in charge of a ship within any district where the employment of the pilot is compulsory. The collision now in question took place in the London district, which, by s. 370, comprises the waters of the Thames as high as London Bridge, and the seas and channels leading thereto as far as Dungeness to the south; and it was compulsory upon the defendants' ship to take in a pilot at Dungeness. Primâ facie, therefore, the defendants were protected as well by the common law as by the provisions of the statutes; but there are exemptions from compulsory pilotage in both statutes, and the plaintiffs rest their case upon these exemptions. The contention of the plaintiffs is that, notwithstanding the defendants' ship compulsorily took in a pilot at Dungeness, and was bound to pay for navigating the ship to Gravesend, nevertheless, when the ship arrived at Yantlett Creek, which they contend is the limit of the port of London eastward, then the compulsory character of the employment of the pilot ceased, and the defendants became responsible for his default as if he had been a mariner selected and hired by them by contract between them. If I had been called upon for the first time to put a construction upon the exemption, I should have thought it meant ships navigating from one place to another within the limits of the port; but I am not prepared to differ from the judgments of the Courts on the subject; nor am I prepared to hold that if a ship belonging to the port of London and liable compulsorily to take a pilot at Dungeness, acted in conformity with the 378th section, and kept the usual signal for a pilot flying all the way from Dungeness to Yantlett Creek (assuming it to be the limit eastward of the port), and no pilot had appeared or offered himself, that there would be an obligation upon the ship to take in a pilot after passing this creek. Nevertheless, I am of opinion that when the pilot was taken in compulsorily at Dungeness, and employed to navigate the ship to Gravesend, the ship did not when she arrived at Yantlett Creek become a ship navigating within the limits of the port to which she belonged, so as to constitute the pilot a servant of the defendants, and render them liable for his default. In my opinion the pilot was, by the provisions of the acts of parliament, to pilot the ship to Gravesend, and was alone responsible for his own fault, and no liability was cast upon the defendants by the mere circumstance that the ship had arrived at Yantlett Creek.

But what was principally relied on by the learned counsel for the plaintiffs was the case of *The Stettin* in the Court of Admiralty, and afterwards in the Privy Council. (1) The learned judge of the Admiralty Court thought the shipowner not liable under the provisions of the Merchant Shipping Act, but liable under the old Pilot Act, 6 Geo. 4; the Privy Council thought him liable under the Merchant Shipping Act; and so the case stands. In this case it was assumed that if the pilot was not compulsorily piloting the ship the owner was of necessity responsible for his default. It is unfortunate that the case of *Lucey* v. *Ingram* (2) was not cited, for the contrary was there decided. The declaration there was the ordinary one against the owner of a ship for negligence. The plea was, that the ship was under the charge of a licensed pilot, acting under the provisions of the Pilot Act, 6 Geo. 4, and that the damage happened from his neglect. The replication was, that the ship had been brought into a dock in the port of London by a pilot duly licensed; that she there completed her voyage and discharged her cargo, and was at the time when, &c., being removed, and in the course of removal, from the dock to a dry dock in the port of London to be repaired. To this replication there was a demurrer.

Now, putting the present case in the most favourable view for the plaintiffs, the judgment in *Lucey* v. *Ingram* (2), is directly in point. The plaintiff complained of damage to the ship; the defendants answered that the ship was under the pilotage of a licensed pilot; the plaintiff replied that by virtue of an exception in the Pilot Act (3), similar to the fifth in the Merchant Shipping Act, his employment was not compulsory. The Court of Exchequer, after full argument and time taken to consider, gave judgment for the defendant. Baron Parke delivered the judgment; after stating the facts and provisions of the statute, he says, that the plaintiff does not dispute that the pilot was in fact in charge of the ship, but he avers by his replication that at the time of the accident the ship was in circumstances in which the act had not made a pilot necessary, and, consequently, that the pilot was not in charge of the ship in pursuance of the provisions of the act; but could only be considered as the private servant of the owner. The defendant need not have employed a pilot at all, but he did; and the learned Baron states the opinion of the court to be, that as the pilot was bound to perform the service at the rate of payment fixed by the act, he was acting in the charge of the ship in pursuance of the act, and that the defendant was not responsible for his default. He says (1): "The object of the legislature in establishing pilots has been to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common difficulty. To effect this it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board, and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound under a penalty in a great measure to divest himself of its control, and to give up the charge to the pilot. As a necessary consequence, the master and owners are exempted from responsibility for acts resulting from the mismanagement of the pilot. But the legislature has considered that there may be some classes of cases in which the presumption of due competency on the part of the master is so great as to make it safe to relieve him of the obligation of taking a pilot if he chooses to navigate for himself; still, however, making it the duty of the pilot to serve, if required so to do, and in most of such excepted cases preventing the master from employing any person other than a licensed pilot, if he does not undertake the navigation himself. The language in which the legislature has exempted masters or owners from responsibility on account of accidents arising from the fault of the pilot, is certainly comprehensive enough to embrace these latter cases, as well as

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(1) Brow. & Lush. 199, 203.
(2) 6 M. & W. 302.
(3) 6 Geo. 4, c. 125, s. 63.

(1) 6 M. & W. at p. 315.

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those in which the taking a pilot has been made a matter of absolute obligation; and it may have been considered desirable to give this more extended exemption as an inducement to take a pilot, even in cases where such a course might perhaps be safely dispensed with. It is always the interest of the public that the ship should be under the control of a pilot, because the legislature has taken what it considers due security for his competency; and, therefore, even where taking a pilot is optional on the part of the master, the legislature may well have intended to encourage his employment, by extending, according to our construction of the 55th section, the benefit of exemption from responsibility." I concur in this judgment, and as it was not cited in the case of *The Stettin* (1), I think I am justified in acting upon it. It is the judgment of a court of common law upon the construction of a statute, when the true question was fully argued, and a deliberate judgment pronounced upon it. In my opinion, the argument on behalf of the plaintiffs is grounded upon the fallacy that when the ship was once brought within the limits of the port of London the relation between the defendants and the pilot was altered and converted into that of master and servant. In my opinion, such relation never did exist between them, and if it did not, the defendants are not liable, for no other relation except that of master and servant would create the liability. For these reasons I am of opinion the defendants are entitled to our judgment.

As to the second question, viz., what is the limit eastward of the port of London? I find a great difficulty to give an answer. I presume there is no doubt that "port" there means the same as "port" in the second part of the Merchant Shipping Act, 1854, ss. 30 and 33. The plaintiffs contend that the limit is a line drawn from Yantlett Creek (which is several miles east of Gravesend) to the opposite shore in Essex. Now, it is certain that the Corporation of London possess, or did possess, some franchise of conservancy between this line and Staines Bridge westward. According to the popular meaning of the word, nothing can be more unlike a port than the river between Gravesend and Yantlett Creek eastward and Richmond and Staines westward. In order, however, to support the plaintiffs' contention, Yantlett

(1) Brow. & Lush. 199, 203, ; 31 L. J. (P. D. & Ad.) 208.

Creek must be deemed the eastern limit of the port. On the other hand, the learned arbitrator is of opinion that the limits for the present purpose are Gravesend eastward and London Bridge westward, and I am rather inclined to agree with him. I presume he acted upon what is to be found in Lord Hale, "De Portibus Maris," p. 46. Lord Hale says: "First, a port is a place for the arrival and unloading of ships; secondly, it is a place having something of a franchise or privilege; and, thirdly, it hath a ville, city, or borough for the reception of mariners and merchants, and for the securing and vending of their goods, and victualling their ships." Now, these three qualities are apposite and fitting to the Thames between London Bridge and Gravesend, but have very little appropriateness to the Thames between Gravesend and Yantlett Creek, which is mere estuary. But Lord Hale goes on to define what is "the creek of a port," and says it is a member or dependent upon another port, and he obviously considers the member of a port to be a place outside a port and beyond its limits. He also, I think, seems to imply that the limits or boundary of a port may vary from time to time, for he proceeds to name the principal ports of the kingdom, and their members, "at this day" (the time of his writing). The first is London cum membris, which he states to be Blackwall, Gravesend, and Lee. It is obvious to my mind that he considered the then port of London, properly so called, to be westward of Blackwall; and if I were driven to form an opinion, I would be inclined to concur with the learned arbitrator that the port of London, within the meaning of the exemption, means "port" within the definition of Lord Hale, viz., that part of the Thames where there are docks, quays, wharves, warehouses, cranes, and other conveniences for loading and unloading goods, and also merchants' counting-houses and offices, and tradesmen's shops to supply shipping with necessary supplies. But I prefer giving no opinion upon the question. As I have already said, I think the defendants are entitled to the judgment of the Court. I consider the case of *Lucey* v. *Ingram* (1) rightly decided. I have the highest respect for the judgment of Dr. Lushington and the Privy Council, but what I consider to be the real point in the case of *The Stettin* (2) was never submitted to

(1) 6 M. & W. 302. (2) Brow. & Lush. 199, 203; 31 L. J. (P. D. & Ad.) 208.

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them, nor was *Lucey* v. *Ingram* (1) cited. The counsel for the shipowners assented to the position that, if the taking of the pilot was not compulsory at the spot where the collision happened, they were liable for the pilot's negligence; for the reasons given in *Lucey* v. *Ingram* (1) I think this is not the test, the true one being, whether there is the relation of master and servant.

In my judgment such a relation never existed between the present defendants and the pilot who committed the wrong; and that, therefore, there is no cause of action.

CHANNELL, B. I have had the advantage of reading the judgments which have been prepared by the Lord Chief Baron and my Brother Martin, and, as my Brother Martin has stated, I agree in the result at which he has arrived, that our judgment should be for the defendants. Had I known that judgment would have been delivered to-day, I should have preferred to have committed my observations to writing, but I do not think it necessary to delay the case for the written expression of my opinion. I do not dissent from any statements of principle that my Brother Martin has laid down in his judgment; but with respect to the extent of the port, I am more disposed to agree with the view which the Lord Chief Baron takes on that point, namely, that the port extends from Staines to Yantlett Creek.

I entirely agree, however, with my Brother Martin that the main question is, whether as between the defendants and the pilot on board the defendants' ship the relation of master and servant existed. Now, I think the case in the Exchequer, of *Lucey* v. *Ingram* (1), is expressly in point, and, like my Brother Martin, I am unable to distinguish the cases. Nor do I feel pressed with the authority of *The Stettin* (2) to the extent to which I understand the Lord Chief Baron feels himself to be, because it appears to me that our present decision is consistent with that case. The Privy Council there decided that the words "navigating within" in the 379th section of the Merchant Shipping Act, 1854, mean "being within," and therefore that a vessel belonging to the port of London, and coming from a foreign part, is exempted from the employment of a licensed pilot in the River Thames. But even if

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(1) 6 M. & W. 302.

(2) Brow. & Lush. 199, 203.

I thought that case directly in point, I should have felt myself at liberty to abide by the decision in *Lucey* v. *Ingram* (1), which was a well-considered case and a unanimous judgment of the Court of Exchequer, seeing it was not cited in the Privy Council, as, indeed, it has not been in the present case. The pilot was here shipped at Dungeness to pilot the ship to Gravesend. He was entitled to be paid for his pilotage during that time. He was not discharged from the ship, but was on board, and had control of the vessel at the time of the collision, the vessel not having arrived at Gravesend. Then although, if my view of the limits of the port be a correct one, the ship had already entered the port of London, yet the defendants having complied with the law in shipping a pilot at Dungeness, that exempts them from liability to this action, the pilot being on board at the time, and the case having expressly found that the collision was the result of his negligence.

With that explanation, I agree with my Brother Martin in the result at which he has arrived, and in the grounds of his opinion, but I rather agree with the Lord Chief Baron in the view he takes as to the extent of the port.

KELLY, C.B. The plaintiffs sue the defendants for damages arising from a collision between their respective ships in the Thames, a little to the west of Leigh, and between Gravesend and Yantlett Creek.

The defendants, admitting negligence, resist the action on the ground that their ship was navigated by a licensed pilot whom it was compulsory on them to employ; and the question is, whether it was compulsory upon defendants to employ a licensed pilot at that spot. It is admitted that the ship belongs to the port of London, and was on her homeward voyage from Quebec. A licensed Trinity House pilot was taken on board off Dungeness, and navigated the ship until it arrived at the spot before mentioned, when the collision took place. The case has been referred to an arbitrator to settle, and he has found, as far as it was a question of fact, and it was competent to him to do so, that the port of London extends no further eastward than Gravesend.

By the Merchant Shipping Act, 1854, s. 388, it is enacted, that no owner or master of any ship shall be liable for any loss or damage occasioned by the negligence of a licensed pilot, where the employment of such pilot is compulsory by law. By s. 370, the London pilotage district extends from London Bridge in the Thames and Rochester Bridge in the Medway respectively, to Orfordness on the north and Dungeness on the south. By s. 353 the employment of a licensed pilot is compulsory in all districts in which the same was by law compulsory at the time of that act coming into operation; and all exemptions from compulsory pilotage then existing were to remain in force.

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(1) 6 M. & W. 302.

By s. 376 the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, include, among others, the London district; and a penalty is imposed upon all masters navigating vessels without such pilot and within such district, unless he be exempt. But by the 6 Geo. 4, c. 125, s. 59, it is enacted, that the master of any ship or vessel whatever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision has been made by any act of parliament or charter for the appointment of pilots, may lawfully, and without being subject to any penalty, conduct his own ship, as long as he shall do so without the aid of an unlicensed pilot: and by the Merchant Shipping Act, 1854, s. 379, art. 5, it is enacted, that "Ships navigating within the limits of the port to which they belong," are likewise exempt from the compulsory employment of a pilot.

Two questions, therefore, arise in this case:—

1. It being admitted that the vessel belongs to the port of London, is the spot at which the collision happened within that port?

2. If it be, was it compulsory upon the master to employ a licensed pilot at that spot?

Upon the first point I am of opinion that it is clearly established upon the whole current of authorities, legal and historical, from the earliest times to the present day, that the port of London is co-extensive with the jurisdiction of the corporation of the city of London, and extends from Staines Bridge to Yantlett Creek. Maitland's History of London, and the learned work of Mr. Serjt. Pulling, are clear to this effect.

In 1 Roll. Abr., Customs de London, O. 6, p. 557, we find: "It is a good custom of London that they have been used in all times to have the metage or measurage of sea coals infra portum London, which extends from Staines Bridge to London Bridge, and thence to Gravesend, and from thence along to Yantlett; and all this is the port of London."—Mich., 11 James I., *City of London* v. *Manley*, per Curiam.

In *Fazakerly* v. *Wiltshire* (1), upon a question whether a custom in the city of London, that none but free porters should carry or measure corn, roots, and other articles from any vessel on the river, and whether imported or exported, and in which this very question of the limits of the port of London arose, it was expressly determined that the port extended to Yantlett Creek, and it was said by the Court (2) that this was shewn by many ancient records cited, and that the Attorney-General had confessed the claim of the city to this jurisdiction *in Scaccario:* Trin. 3 James I., Rot. 89; Coke's Entries, 535*b*. 537*a*. (3) Many other cases to the same effect were cited at the bar, and there is really no authority whatever to the contrary. Hale, de Portibus Maris, was referred to, but the passage quoted merely shews that in ancient times the port of London extended to Greenwich, and that Gravesend was a member of the port; but it in no wise negatives the limits of Staines Bridge to the west, and Yantlett Creek to the east. So the acts of parliament relating to the customs establish that, for revenue purposes, the port extends much further seaward than Yantlett Creek, but these acts do not affect the question of its limits in relation to any other purpose.

The remaining question is, whether it was compulsory upon the master to employ a licensed pilot to navigate the vessel at the spot at which the collision took place, that spot being within and the vessel belonging to the port of London. Upon this point the case 2 PC 531-2
of *The Stettin* (4) is conclusive. That case, decided first before Dr. Lushington in the Admiralty Court, and afterwards upon appeal by the Privy Council, is express to shew that a vessel belonging to the port of London, and inward bound from a foreign port, is exempt, both under the 6 Geo. 4, c. 125, s. 59, and s. 379 of the Merchant Shipping Act, 1854, and that it is not compulsory

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(1) 1 Str. 462. (2) 1 Str. at p. 469. (3) Cited, 1 Str. at p. 468.

(4) Brow. & Lush. 199, 203; 31 L. J. (P. D. & Ad.) 208.

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upon the master of such a vessel to employ a pilot within the limits of the port of London. (1)

The Privy Council likewise held, that whether such a vessel was proceeding outwards or inwards, to or from a foreign port, or navigating between one point and another, both being within the port of London, the exemption equally applied; and that the words "ships navigating within the limits of the port to which they belong," in the Merchant Shipping Act, 1854, s. 379, art. 5, mean "being" within the limits of the port. In this case, accordingly, the owner of the vessel employing within the port of London the licensed pilot by whose negligence the damage was occasioned, was held liable for such damage to the owner of the vessel injured, on the ground that the employment of the pilot not being compulsory he became the servant of the owner, who was therefore responsible for his negligence. *M'Intosh* v. *Slade* (2), and *Lucey* v. *Ingram* (3), were decided under different circumstances and upon different provisions of the statutes from those which govern the present case. But in *Lucey* v. *Ingram* (3) it certainly is decided that although the employment of a pilot by whose negligence the damage was occasioned was not compulsory upon the master, the owner of the vessel was nevertheless protected from liability by the 55th section of the General Pilot Act. But this decision proceeded upon the 72nd section, which has no bearing upon the present case, and there was no exemption in that case by reason of the vessel belonging to the port of London. If, however, that case must be taken to have decided that where the employment of a licensed pilot is voluntary and not compulsory, by reason of the place of employment being within the port to which the vessel belongs, the owner is nevertheless not responsible for the negligence of the pilot, it is directly opposed to the decision in the case of *The Stettin* (4) by the Judicial Committee of the Privy Council, which, being a decision of a court of the last resort, must, I think, govern the decision of this court in the case now before us. A difficulty arises from the London district, within which it is compulsory upon the owners of the ships not exempt to employ a licensed pilot, extending from Dungeness to London Bridge, and there being no landing place, or anything but an imaginary boundary line, at Yantlett Creek, where the port of London and the exemption of vessels belonging to that port begin. The provision of the Merchant Shipping Act defining the London district (s. 370) is general, and makes no reference to the exceptional cases in which exemptions exist, but it is perfectly consistent with this provision that, although from there being no landing place at Yantlett Creek a licensed pilot hired at Dungeness to navigate a vessel bound to London must be carried on to Gravesend, the compulsory employment by the master ceases when the vessel has crossed the boundary line at Yantlett Creek, and from that point to Gravesend the master may take the helm and navigate the vessel himself, and that if he think fit to employ the pilot from Yantlett Creek to Gravesend, such employment is voluntary, and constitutes the pilot the servant of the owner.

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(1) See ante, p. 334, note.

(2) 6 B. & C. 657.

(3) 6 M. & W. 302.

(4) Brow. & Lush. 199, 203.

Upon the ground therefore that this vessel belongs to the port of London, that the spot at which the collision took place is within the limits of the port, that the employment of a licensed pilot at that spot was not compulsory but voluntary, and consequently that the owners are responsible for the negligence of the pilot, thus voluntarily and not compulsorily employed, I am of opinion that the plaintiffs are entitled to the judgment of the Court.

This decision is certainly at variance with the principle of the case of *Lucey* v. *Ingram* (1); and I regret that the law does not extend its protection to all who bonâ fide employ a licensed pilot, under whatever circumstances, and whether compulsorily or voluntarily, in any of the districts where pilots are appointed by the Trinity House; but I do not feel myself at liberty to depart from the law as laid down in the case of *The Stettin* (2) by the overruling authority of the Judicial Committee of the Privy Council, a court, as already observed, of the last resort, and whose decision appears to me conclusively to govern the case now before the Court.

Judgment for the defendants.

Attorneys for plaintiffs: *Pearse & Co.*

Attorneys for defendants: *Bischoff, Coxe, & Bompas.*

(1) 6 M. & W. 302. (2) Brow. & Lush. 199, 203.

END OF TRINITY TERM.

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ARBITRATION—*Award—Admissibility of Umpire's Evidence—Injurious Affection of Premises—Substitution of Roadway for River—Loss of "Amenity"—Lands Clauses Act*, 1845—*Thames Embankment*, 1863 (25 *&* 26 *Vict. c.* 93)—*Easement.*] The plaintiff was lessee of the Crown for the residue of a term of ninety-nine years from January, 1855, of a house and premises at Whitehall, together with all ways, easements, and appurtenances whatsoever thereto belonging or "therewith or with any part thereof held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part or parcel thereof." Until the execution of the works hereinafter mentioned the premises abutted eastward on the river Thames, and were bounded by a wall along the whole length of which, at high water, the river flowed. In this wall was a gate usually kept locked, leading from the garden of the house unto a causeway which ran out into the river to low-water mark. The causeway was, and for more than forty years had been, exclusively used by the plaintiff, for landing from the river various articles of household use, and for other purposes. The defendants (the Metropolitan Board of Works) in 1863, commenced the construction of an embankment of the Thames, from Westminster to Blackfriars Bridge, under the powers given them by the Thames Embankment Act, 1862, and in the course of working they removed the plaintiff's causeway and the landing-place connected with it, and entirely shut off the plaintiff from direct access to the river. Where the water had formerly flowed a solid embankment, destined for a public highway, was constructed. The plaintiff thereupon gave the defendants notice of arbitration and claim for compensation, stating in his notice that he was owner of the causeway as lessee thereof and entitled as such lessee to the use and enjoyment of the landing-place, and of the easements, rights, and privileges belonging thereto, and connected therewith, and claiming compensation for the removal of the causeway and landing-place, and for the depreciation in value of his house and lands, and otherwise injuriously affecting them. The arbitrators referred the question of the amount of compensation payable to an umpire, who eventually awarded 8328*l.* to the plaintiff "as and for compensation for the interest of the Duke of Buccleuch (the plaintiff) in the said causeway, pier, or jetty, and for shutting up the said landing-place, and for damage by the depreciation of the said house, &c., by the otherwise injuriously affecting the same by the execution by the said board (the defendants) of the said works, and by the exercise of the powers of the said act. At the trial of an action on the award the umpire was examined on behalf of the defendants as to the mode in which he had arrived at the sum awarded. He stated that amongst other items he had given 5000*l.* for depreciation of the premises in value, and that in arriving at the sum he had taken into consideration the loss of privacy and "amenity" which the plaintiff had sustained through the defendants' works. The award was good on the face of it:—*Held*, that the plaintiff was entitled to recover in the action. Per Kelly, C.B., Martin and Channell, BB., that the umpire's evidence was admissible, but that so far as it was relevant it confirmed the award. Per Bramwell, B., that the umpire's evidence was not admissible. *Semble*, per Kelly, C.B., that the words in the lease conferred an ownership in the soil of the causeway on the plaintiff. *Semble*, per Martin, B., that the words conferred on him an easement only. Per Kelly, C.B., Martin and Channell, BB., that the plaintiff's interest, whether proprietary or otherwise, was sufficient, and was sufficiently described in his notice of claim to entitle him to the compensation awarded to him by the umpire in respect of the matters stated by the umpire to have been included in the award. *Re Stockport Railway Company* (33 L. J. (Q.B.) 251), commented upon.

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BANKER—*Customer—Disclosing Customer's Account—Justifiable occasion.*] In an action by a customer against his banker for disclosing the state of the customer's account without justifiable cause, the question was left to the jury whether under the circumstances it was reasonable and proper to make such disclosure:—*Held* that, assuming the existence of a legal duty on a banker not to disclose his customer's account, except upon a reasonable and proper occasion, the question of whether the disclosure was made on such an occasion was rightly left to the jury. *Quære*, whether by virtue of the relation of banker and customer, any legal duty is imposed on the banker not to disclose his customer's account, except upon a reasonable and proper occasion, so as to give a cause of action without special damage; or whether the banker's duty is not merely a duty not to act to the prejudice of his customer, requiring special damage to make a breach of the duty actionable. *Foster* v. *Bank of London* (3 F. & F. 214), considered.
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BANKRUPTCY—*Husband and Wife—Separation Deed—Covenant to pay Annuity during separation—Contingency*—12 & 13 *Vict. c.* 106, *s.* 175—24 & 25 *Vict. c.* 134, *s.* 154.] By a deed of separation a husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future cohabitation by mutual consent:—*Held*, that this was not an "annuity" proveable under 12 & 13 Vict. c. 106, s. 175, nor a liability to pay money under 24 & 25 Vict. c. 134, s. 154.
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BANKRUPTCY ACT, 1861 (24 & 25 VICT. c. 134), s. 198—*Sheriff—Arrest—Protection—Certificate of Registration.*] A certificate of the registration of a deed under the Bankruptcy Act, 1861, does not, by virtue of s. 198, protect the debtor from arrest for debts not bound by the deed, nor the sheriff in releasing him, at least without due inquiry. To an action for an escape, the defendant pleaded that the debtor produced a certificate of the registration of a deed, within s. 198 of the Bankruptcy Act, 1861. Replication, that the judgment was subsequent to the registration, of which fact the defendant had notice, and which was stated on the writ of ca. sa.; that it was obtained on a debt which became due subsequently to the registration; and that the plaintiffs were not creditors under the deed in respect of the debt, as the defendant might with due care have known:—*Held*, on demurrer, a good replication.
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2. ————————, *s.* 192—*Trustees of Deed—Relation of Title—Fraudulent Preference—Act of Bankruptcy.*] Where a deed under s. 192 of the Bankruptcy Act, 1861, conveys all the estate and effects of the debtor to trustees, to be held and administered by them for the benefit of the creditors, as if the

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debtor had been adjudicated bankrupt, the title of the trustees has by virtue of s. 197 relation back; and they can bring trover for goods fraudulently transferred by the debtor before the execution of the deed, without doing any act to avoid the transaction.
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BETTING—*Gaming—Construction—" Office"—" Place"*—16 & 17 *Vict.* c. 119.] On land adjoining a race-course, and just outside an inclosure reserved for ticket-holders, was a long strip of ground of six feet wide, bounded on one side by an iron railing which surrounded the inclosure, on the other side by a permanent wooden paling, facing the open ground. Within this strip were placed temporary wooden structures, in which during the races the business of betting was carried on. They had desks fronting both ways, and at each desk was a clerk with a book, and a person standing in front of each desk conducted the business on behalf of the person who rented the strip of land, and the bets were recorded by the clerk. At one of these structures the appellant conducted this business. On appeal from a conviction under 16 & 17 Vict. c. 119, s. 3:—*Held*, that this structure was an "office" and a "place" within the meaning of the statute, and that the appellant was rightly convicted.
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CARRIERS—*Railway Company—Negligence—Duration of Transit—Completion of Contract of Conveyance—Delivery.*] The plaintiff delivered to the defendants, as common carriers, some cattle to be carried by them to their London station. The cattle arrived on a Sunday morning between 11 and 12 o'clock, but owing to certain police regulations the plaintiff was unable to take them away before 12 o'clock at night. Meanwhile, they were placed by the defendants' servants, with the sanction and assistance of a man employed by the plaintiff to receive them, in pens at the station. Early on the Monday morning when the plaintiff's servant went to take them away, he found that two steers had been killed. He wished to take away the remaining cattle, but was refused permission unless he signed a receipt ticket for the whole number, which he declined to do. Later in the day the plaintiff came and removed them, but before he could reach the market at Islington for which they were intended, it was over, and he could not sell them until the Thursday following. In an action for the value of the two steers which were killed, and for the damage done to the remaining beasts by delay:—*Held* (per Bramwell and Channell, BB., Martin, B., dissentiente), that the defendants' liability

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as carriers had ceased when the alleged loss and damage occurred. Per Martin, B., that the defendants still had possession of the cattle as carriers, and were liable as such, when the two steers were killed; and that there had been a wrongful refusal on their part to deliver to the plaintiff's servant on the Monday morning, for the consequences of which they were also responsible.
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2. CARRIERS—*Negligence—Pleading—Contract, construction of.*] The defendants, carriers in India, received the plaintiff's goods under a contract, by which the baggage of certain troops (including the plaintiff's goods) was to remain in charge of a guard provided by the troops, "the company accepting no responsibility:"—*Held*, that the stipulation did not exempt the defendants from liability for a loss arising wholly from their own negligence. The plaintiff and his goods were carried by the defendants under a contract with the Indian Government, and whilst being so carried his goods were destroyed by the defendant's negligence:—*Held*, that, although the plaintiff could not sue the defendants for non-performance of their duty as carriers, he was entitled to sue for an injury done to his property through their negligence, whilst the goods were in their custody.
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3. ————, *Power to commence business—Whole Capital subscribed for.*] A clause in the articles of association of a company registered under the Companies Act, 1862, provided that in case the whole of the shares into which the nominal capital of the company was divided should not be subscribed for or allotted, the registered members of the company for the time being should, *if the directors should by resolution so declare*, be and continue associated for the objects thereof; and the regulations for the management of the company should be in force and binding on such members in like manner as if the whole of the shares into which the nominal capital was divided had been subscribed for and allotted, and the business of the company might be commenced from that time:—*Held*, that, until the whole of the capital was subscribed for or allotted, or the directors had passed a formal resolution for continuing the company, the directors had no power to make a call, and a call so made could not be recovered against a shareholder.
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CONSTRUCTION—*Deed—Estoppel.*] In 1801, by a deed since lost, after reciting the conveyance to the defendants by Lord Vernon, by a deed poll of even date, of the site of a canal and other premises, in consideration of an annual rent of 105*l.*, to be paid to him "or the person

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or persons to whom the freehold or inheritance of the premises thereby released should for the time being belong, in case the said instrument or deed poll had not been made;" the defendants covenanted with Lord Vernon, "and to and with the said person or persons to whom the freehold or inheritance of the hereditaments and premises hereinbefore recited to be released *shall for the time being belong*," to pay the said yearly rent-charge in manner as and at the times whereon the same shall become due and payable; and a power to distrain for non-payment of the rent-charge was given, and covenants made by the defendants, to and with persons described, in the same terms as the grantees of the rent-charge. In 1827, by a deed poll reciting the last deed verbatim, and the fact of its loss, and reciting the death of Lord Vernon, and that the "freehold and inheritance of the hereditaments and premises mentioned and comprised in the said deed poll, *or the said rent-charge or yearly sum of* 105*l*.," was then vested in the Earl of Jersey, and that the rent-charge had been duly paid to Lord Vernon during his life, and to the Earl of Jersey since his death; the defendants ratified and confirmed the deed poll so executed as aforesaid, and declared that the same should be "good, valid, and effectual, to all intents and purposes, according to the true intent and meaning thereof, notwithstanding the same is lost or mislaid as aforesaid." In an action by the assignee of the rent-charge:—*Held*, that the terms of the deed of 1801 were explained by the recital contained therein and the recitals of the deed of 1827, and that the latter deed, admitting under the defendants' seal that the rent-charge was then vested in fee in the Earl of Jersey, estopped the defendants from denying it, and formed good evidence of a valid grant.
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2. CONSTRUCTION—*Easement—Ways "used, occupied, and enjoyed"—Surrender.*] A lessee surrendered to his lessor, the defendant, a part of the demised premises, "together with all ways, &c., therewith now used, occupied, and enjoyed," with a proviso that the defendant should fence off the premises surrendered from those still occupied by the lessee. The premises so surrendered consisted of a strip of ground, forming part of a farmyard, with some farm buildings upon it, and was bounded on one side by land owned and occupied by the defendant, and on the other by a hard gravelled roadway, made across that portion of the open farmyard still occupied by the lessee, from a gateway in the street up to the opposite fence. There had always been unity of seisin and of occupation of the whole farmyard, and this roadway had been made and used by former occupiers of the yard, and by the present lessee, for the convenience of carting heavy loads to and from the yard and the farm buildings. There was no existing approach to the premises surrendered from the defendant's land, and a road constructed for that purpose would have to pass through the defendant's pleasure ground:—*Held*, that no right to use this roadway as a means of access to the surrendered premises passed to the defendant. Per Kelly, C.B., that, by a grant of hereditaments, with all "ways therewith now used, occupied, and enjoyed," those ways only pass which have at some former period been used as of right therewith. *Thomson* v. *Waterlow* (Law Rep. 6 Eq. 36), followed.
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COPYHOLD—*Surrender to Joint Tenants—Admittance of one Surrenderee—Disclaimer by others before admittance—Time for Disclaiming—Effect of previous acts of ownership—Lord's Fine.*] A disclaimer by two out of three joint tenants, surrenderees of certain copyhold lands belonging to a manor, executed *before* the admittance of the remaining joint tenant, but *after* the exercise by all the three of various acts of ownership over the estate, is void, and the lord is entitled to a fine as upon the admittance of all.
BENCE *v.* GILPIN 76

COSTS—*Costs of Opposing Private Bill in Parliament—Time for Application to Tax—Taxing Master's Certificate—28 & 29 Vict. c. 27, ss. 3 & 5.*] By s. 1 of 28 & 29 Vict. c. 27, the petitioners against a private bill in Parliament are in certain cases entitled to recover costs against the promoters by the report of the committee. The third section enacts that "on application made to the taxing officer of the house by such petitioners, not later than six calendar months after the report of such committee, *and* not until one month after a bill of such costs shall have been delivered to the party chargeable therewith," the taxing officer shall examine and tax such costs:—*Held*, that the one month to elapse after delivery of the bill of costs is a month previous to the application to tax, and that therefore an application made not later than six months from the report, but before one month from the delivery of a bill of costs, was informal, although more than one month elapsed between the delivery of the bill and actual taxation. By s. 3, the taxing master's certificate is made conclusive evidence of the amount due and of the title of the party therein named to recover the same; and by s. 5, "the validity of such certificate shall not be questioned in any court:"—*Held*, that these provisions apply only to certificates granted in accordance with the terms of the statute, and that the validity of a certificate based on an informal taxation might be questioned.
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2. COSTS—*County Courts Act*, 1867 (30 & 31 *Vict. c.* 142)—*Power to make Order for Costs under Repealed Act—Effect of repeal—Verdict before repeal.*] The plaintiff, in December, 1867, obtained a verdict for 5*l.* in an action of contract commenced before the 20th of August, 1867, on which day the County Courts Act, 1867, which repealed the 15 & 16 Vict. c. 54, s. 4, was passed, and which came into operation on the 1st of January, 1868. After the 1st of January 1868, he applied to a judge under the 15 & 16 Vict. c. 54, s. 4, for an order for costs, on the ground that the superior and county courts had concurrent jurisdiction:—*Held*, that the action having been commenced before the County Courts Act, 1867, passed, and the verdict having been found before it came into operation, the plaintiff was entitled to his costs as a matter of right, and that, notwithstanding the repeal of the 15 & 16 Vict. c. 54, s. 4, there was power to make the order.
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3. ———, *County Court Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 33.] An action of contract was referred, and an award was made in favour of the plaintiff in July, 1867, for a sum less than 20*l.*, the jurisdiction not being concurrent. The learned judge who tried the case, declined to certify that it was a case proper to be tried in a superior court. Judgment had never been signed. The plaintiff contended that the Statute of Gloucester was in operation, and that it entitled him to costs. The Court held that the right to costs was fixed at the date of the award, and the plaintiff was therefore not entitled to costs, as 13 & 14 Vict. c. 61, s. 11, and 15 & 16 Vict. c. 54, s. 4, now repealed by 30 & 31 Vict. c. 142, s. 33, were then in force and deprived the plaintiff of his costs to which otherwise he would have been entitled under the Statute of Gloucester.
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6. ——— of wife in suit for restitution may be necessaries 63
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COUNTY COURT—*Jurisdiction—Title—Landlord and Tenant.*] The 50th section of 19 & 20 Vict. c. 108, giving to landlords a summary remedy in the county court, does not apply where a question of title is involved; and if the alleged tenant makes a bonâ fide claim of ownership, the jurisdiction of the county court judge is ousted.
PEARSON AND ANOTHER *v.* GLAZEBROOK 27

2. —————, *Appeal—Abandonment of portion of Claim*—13 & 14 *Vict. c.* 61, *s.* 14.] In a county court plaint the particulars showed a claim for the balance of a sum of 54*l.*, reduced by various deductions to 19*l.* 12*s.*; but, by a miscalculation apparent on the face of the particulars, one of the items of deduction was stated at 11*l.* 7*s.*, instead of 10*l.* 7*s.* At the request of the defendant, who wished to appeal, but against the will of the plaintiff, the judge amended the particulars by inserting the real balance, viz., 20*l.* 12*s.*, but permitted the plaintiff to abandon the excess, and a verdict was found for 19*l.* 12*s.*:—*Held*, that the plaintiff could not abandon the excess so as to deprive the defendant of his right of appeal.
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DEFAMATION—*Plea of apology and payment into court—Admission—Damages, assessment of, the plea not being proved*—6 & 7 *Vict.* c. 96, s. 2.] To an action for a libel in a newspaper the defendant pleaded a plea, under the 6 & 7 Vict. c. 96, s. 2, alleging that he inserted a full apology, &c.; and he paid 5*l.* into court. The jury, having found the apology not sufficient and the plea therefore not proved, were directed by the judge to assess the damages irrespective of the 5*l.* paid into court, and without considering that payment in any way as an admission of liability:—*Held*, a proper direction.
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FALSE IMPRISONMENT—*Reasonable and Probable Cause—Hearsay Evidence.*] Where a person having received information which causes him to suspect another of a felony, which has in fact been committed, gives him into custody without availing himself of a ready and obvious mode of ascertaining the truth, the absence of inquiry is an element in determining the question of the existence of reasonable and probable cause. The defendant, upon whose premises a felony had been committed, acting on the faith of information given to him by his own coachman, the most material part of which was derived from one Robinson, a neighbour's coachman, gave the plaintiff into custody on the charge, without making any personal inquiry of Robinson. The plaintiff having brought an action of false imprisonment, the judge who tried the cause directed the jury that on that state of circumstances, there was no reasonable and probable cause, and a verdict was given for the plaintiff. The Court of Exchequer Chamber (affirming the decision of the Court of Exchequer), refused to disturb the verdict on the ground of misdirection.
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FINE on admittance to copyhold of one of three joint tenants, surrenderees, two having disclaimed 76
See COPYHOLD.

FIRE INSURANCE—*Construction of Policy—" Gas "—" Explosion."*] A policy of fire insurance contained the following exception: "Neither will the company be responsible for loss or damage by explosion, *except*

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for such loss or damage as shall arise from explosion by *gas*." In the premises of the plaintiff (the insured), who carried on the business of extracting oil from shoddy, an inflammable and explosive vapour evolved in the course of the process escaped and caught fire, setting fire to other things; it afterwards exploded and caused a further fire, besides doing damage by the explosion:—*Held*, first, that the word *gas* in the policy meant ordinary illuminating coal gas. Secondly, that the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred in the course of a fire; and that it exempted the defendants in respect both of the damage from the explosion itself, and of the damage done by the further fire caused by the explosion.
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FRAUDULENT PREFERENCE—*Bill of Sale—Agreement to give Bill —Act of Bankruptcy—Bankruptcy Act*, 1849 (12 *&* 13 *Vict. c.* 106), s. 67.] A trader, being indebted to the defendant, gave his acceptance to him for the amount of the debt. Three days before the acceptance was due he agreed to give the defendant a bill of sale on all his effects and stock-in-trade, in consideration of the defendant taking up the acceptance, and to cover any further advance which might be made to him by the defendant. The defendant accordingly took up the acceptance, and afterwards lent an additional sum of 64*l.* to the trader, upon the understanding that it should be included in the bill of sale. A bill of sale was subsequently executed in pursuance of the agreement, whereby the whole of the trader's personal estate, of which he was then or should in future become possessed, was assigned to the defendant, as security for the debt due from the trader to him. The trader's property was worth about 115*l.* Less than twelve months from the date of this bill of sale, but more than twelve months from the agreement to give it, the trader became bankrupt. In an action of trover by his assignee in bankruptcy against the defendant for the goods included in the bill of sale, some of which had been acquired after the agreement:—*Held* (affirming the judgment of the Court below), that the sum of 64*l.* was a fair present equivalent for the assignment by the trader of his goods, and that the bill of sale, therefore, conferred on the defendant a good title to them as against the plaintiff.
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HUSBAND AND WIFE—*Desertion—What are "Necessaries" for the Wife—Costs of Suit for Restitution—Expenses of Professional Advice—Counsel's Opinion—Attorney's Bill.*] The legal expenses incurred by a deserted wife, (1), preliminary and incidental to a suit for restitution of conjugal rights, (2), in obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement, (3), in obtaining professional advice as to the proper mode (a) of dealing with tradespeople, who were pressing her to pay them for various necessary articles supplied to her since she had been deserted, and also (b) of preventing a distress threatened on furniture belonging to her husband in the house she occupied, are necessaries for which she has implied authority to pledge his credit during his lifetime, and for which, after his death, his executors are therefore liable.
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INCLOSURE ACT—*Game—Reservation of Exclusive Right of Shooting—Construction.*] By a private inclosure act an allotment was directed of certain waste lands; by s. 24 the mines, &c., under the allotments were not to be taken into the valuation of the allotments, they being reserved to the lord; by s. 32, subject to the reservations in the act, the allotments were to be the freeholds of the allottees; by s. 34 it was provided that the lord should have "all rents, &c., piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered as game, &c., and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances," in as ample a manner as they are now or have been heretofore used, exercised, and enjoyed by him, or as he "might or could have held, used, &c., the same," in case the act had not been passed; that section contained no reference to mines, but s. 35 reserved them to the lord, with certain powers of search and working. Before the act there was no right of free warren in the lord :—*Held*, reversing the judgment of the Court below, that the act reserved to the lord an exclusive right of sporting over the allotments.
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INFANT—*Necessaries—Province of Judge and Jury—Evidence.*] Articles of mere luxury cannot be necessaries suitable to the condition of any infant. But articles of utility, although luxurious and expensive, may be; and whether they are so or not is a question for the jury in each particular case, subject to the control of the Court as to their verdict. Per Bramwell, B., articles which are *primarily* for mere ornament or amusement, cannot be necessaries, although they may possibly be turned to a useful purpose. The plaintiff sued the defendant, a minor, for the price of a pair of jewelled solitaires, worth 25*l.*, and of an antique silver goblet, worth 15*l.* 15*s.*, which the plaintiff knew, when he supplied it, was intended by the defendant for a present. The defendant was the son of a baronet, with no establishment of his own to keep up, and in the enjoyment of an allowance of 500*l.* a year. The question whether these articles were necessaries was left to the jury, who found that they were:—*Held* (per Kelly, C.B., and Channell and Pigott, BB.), that the question was rightly left to the jury, but that the finding as to the goblet was wrong. Per Bramwell, B., that neither article was a necessary, and that a verdict for the defendant or a nonsuit ought to have been directed. At the trial evidence was offered on the part of the defendant, to prove that when the solitaires were supplied, he was already sufficiently provided with articles of a similar description. The judge rejected the evidence, as it was not proposed to shew that the plaintiff had knowledge of the fact. *Held* (per Kelly, C.B., and Channell and Pigott, BB., Bramwell, B., dissentiente), that the evidence was properly rejected.
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INTERPLEADER, equitable rights of parties considered on, in an action 269
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INTERROGATORIES—*Criminating Question—Time for taking Objection—Interrogating Officer of Corporation.*] In an action for malicious arrest and false imprisonment brought against a municipal corporation, the plaintiff was allowed (Martin, B. doubting) to interrogate the town clerk whether he caused the plaintiff to be arrested, and by what authority he did so. *Semble*, the rule as to interrogatories is to allow all questions to be put that are material, bonâ fide, and not scandalous, and any objection to answer is to be taken at the stage of answering and under the oath of the interrogated party.
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LANDLORD AND TENANT—*Tenancy from Year to Year—Notice to Quit—Determination of Tenancy—Guarantee—Principal and Surety.*] By a notice to quit given to a tenant from year to year, his tenancy is determined on the expiration of the current year, and a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one. M. being yearly tenant to the plaintiff on the terms of a written agreement, the defendant, in consideration of the plaintiff's continuing M. as such tenant, gave to the plaintiff a guarantee for "the rent of the Leese Farm in the occupation of M." The plaintiff afterwards gave M. notice to quit, but on the payment of arrears of rent withdrew it, before the expiration of the current year. The next year the rent became in arrear, and the plaintiff sued the defendant on his guarantee:—*Held*, that the old tenancy was determined by the notice to quit; that the guarantee applied only to the tenancy which existed at the time when it was given; and that the defendant was therefore not liable.
TAYLEUR *v.* WILDIN 303

2. ——————, *Covenant for Quiet Enjoyment—Measure of Damages—Action against Tenant by person claiming under Landlord—Costs of Defence—Defending without Landlord's express Authority—Authority implied from Conduct.*] The defendant demised premises for a term of years to the plaintiff, and covenanted that the plaintiff should occupy the same during the term "without any interruption whatsoever from or by the said defendant, his executors, &c., or any other person or persons lawfully claiming by, from, or under him or them." An action of trespass was afterwards brought by a person claiming under the defendant against the plaintiff, who gave notice of it to the defendant. The defendant paid no attention to the notice, and the plaintiff, acting on his own judgment and without express authority, defended the action. A verdict was eventually found against him, and he was obliged to pay damages and costs. In an action against the defendant, his landlord, for breach of the covenant for quiet enjoyment contained in the demise:—*Held*, that the plaintiff was entitled to recover from the defendant the costs and damages he had paid, and also the expenses he had himself incurred in defending the action of trespass.
ROLPH *v.* CROUCH 44

3. ——————, *Agreement to Repair—Agreement to pay Charges—Nuisances Removal Act*, 1855 (18 *&* 19 *Vict. c.* 121), *s.* 19.] By an agreement of demise of a house and grounds, the landlord undertook to keep the premises in repair, and to pay all rates, taxes, and charges which might be payable in respect of the premises. In the grounds was a piece of ornamental water, in which during the tenancy an accumulation of mud caused at one spot a public nuisance, and at another spot a nuisance to the tenant, and elsewhere choked up the stream. The tenant, being summoned under the Nuisances Removal Act, 1855, in respect of the public nuisance, employed a contractor to clear out the whole stream to the satisfaction of the inspector of nuisances. Afterwards, at the hearing of the summons, an order was made on him to abate the public nuisance. The whole of the mud was cleared out under the contract, that part which constituted the public nuisance being removed partly before and partly after the date of the order:—*Held*, first, that the landlord was not, under his agreement to repair, bound to cleanse the ornamental water. Secondly, that no charge on the premises in respect of any part of the work done had been created by the proceedings under the Nuisances Removal Act, 1855.
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MARINE INSURANCE—*Policy on Profits—Illegal Policy—"Without benefit of Salvage"—19 Geo. 2, c. 37, s. 1.*] A policy on profits is within 19 Geo. 2, c. 37, s. 1, and if made "without benefit of salvage," although "free from average," it is avoided by the statute. *Smith* v. *Reynolds* (1 H. & N. 221; 25 L. J. (Ex.) 337), followed.
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MORTGAGE—*Trade Fixtures—Rights of Mortgagor and Mortgagee.*] Trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee. *Cullwick* v. *Swindell* (Law Rep. 3 Eq. 249), followed.
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NEGLIGENCE—*Public Duty—Local Board—Construction—Towns Improvement Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 34), *s.* 83—*Public Health Act*, 1848 (11 *&* 12 *Vict. c.* 63), *ss.* 68, 139—*Notice of Action.*] The defendants, a local board, left unfenced a goit adjoining a public footpath within their district, by reason of which the plaintiff's husband, while using the footpath, fell into the goit and was drowned:—*Held*, that the defendants were not liable under s. 83 of the Towns Improvement Clauses Act, 1847, as the goit was not a *hole* within the meaning of that section (which refers to holes caused in the construction and repair of houses, &c.); nor under s. 68 of the Public Health Act, 1848, since that section only gives a discretionary power to the local board to place and keep in repair fences, &c., and does not impose upon them an absolute duty to do so. *Quære*, whether, supposing any such duty to have been imposed on the defendants by s. 68 of the Public Health Act, 1848, they would have been liable to an action for neglecting it. *Held*, also, that under s. 139 of the Public Health Act, 1848, the defendants were entitled to notice of action; the alleged cause of action being the continued non-performance of a duty imposed upon them by the Act, and therefore a thing "done or intended to be done" under the provisions of the Act, within the meaning of that section.
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Section 22 of the Nuisances Removal Act, 1855, does not empower the local authority to make a new sewer through private enclosed land, where no sewer existed previously, unless it is absolutely necessary for the purpose of removing an existing nuisance. *Semble* (per Kelly, C.B. and Channell, B.), that the compensation provided by s. 67 of 5 & 6 Wm. 4, c. 50, and by s. 22 of the Nuisances Removal Act, 1855, referring to that section, is compensation only for the damage caused to land in executing the works there described, but not for the permanent injury to or occupation of the land. (Per Martin, B.): That it is compensation for all injury. By the Bury Local Act, improvement commissioners were (s. 102) empowered to make whatever sewers, &c., they should think necessary, and (if it should be found necessary) to carry the same through enclosed lands, "making full compensation to the owners or occupiers thereof;" twenty-eight days' notice was to be given (s. 110), and objections were to be heard by the commissioners before commencing the work; and (s. 111) an appeal to the quarter sessions against the undertaking of any such works by the commissioners was given to any person aggrieved:—*Held*, that these provisions of the local act were not repealed or superseded by the provisions as to sewers in the Nuisances Removal Act, 1855, although the commissioners were (by s. 3) the local authority under that act. The defendants were improvement commissioners for Bury. A watercourse which received the sewage of several drains became a nuisance, and was incapable of being rendered innocuous without constructing a new sewer; the defendants constructed a sewer, carrying it for a short distance by the side of the watercourse, and thence across the plaintiff's enclosed land, where no sewer before existed, to join a lower system of drainage. This was the most convenient and inexpensive course to adopt, but it did not appear that the nuisance could not have been otherwise remedied. The preliminaries required by the local act were not complied with, and the defendants justified under s. 22 of the Nuisances Removal Act, 1855:—*Held* (per Kelly, C.B., and Channell, B.), that the defendants had no power to make the new sewer through the plaintiff's land. (Per Martin, B.): that s. 22 of the Nuisances Removal Act, 1855, gave the defendants power to make the sewer, and that this power was not restrained by the previous local act.
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PLEDGE—*Sale by Pledgee—Trover—Bailment.*] A holder of scrip certificates for shares borrowed of the defendant a sum of money on his own promissory note, payable on demand, and on the security of the shares, and deposited with the defendant the scrip certificates. He afterwards became bankrupt, and the defendant, without demand and without notice, sold ten of the fifteen shares to repay himself his debt. The creditors' assignee, without making any tender of the amount of the debt, brought an action of trover against the defendant to recover the value of the shares:—*Held*, affirming the decision of the Court of Exchequer, that, even assuming the sale to be wrongful, the immediate right to the possession of the shares was not by the sale re-vested in the plaintiff, and that he could not therefore maintain trover, either for the whole value of the shares or for nominal damages. *Donald* v. *Suckling* (Law Rep. 1 Q. B. 585), approved.
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RAILWAY COMPANY—*Superfluous Lands—Abandoned Lands—Construction—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 127, 128.] The 127th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), refers only to superfluous lands, and not to the case of the railway being abandoned or given up.
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2. ——————, *Negligence—Train overshooting platform.*] An excursion train, in which the plaintiffs (husband and wife) were passengers to Rhyl, arrived at Rhyl station, and, the train being a long one, the carriage in which they were overshot the platform. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform, nor was it, in fact, ever so backed, nor did it move until it started for Bangor. After waiting a short time, the husband, following the example of other passengers, alighted, without any request to the company's servants to back the train, or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in so doing strained her knee. There was a footboard between the iron step and the ground, which she did not use, but there was no evidence of any carelessness or awkwardness in the manner of descent, except such as might be inferred from the above facts. In an action brought for this injury:—*Held* (per Martin, Bramwell, and Pigott, BB.; Kelly, C.B., dissentiente), that there was no evidence for the jury of negligence in the defendants; and that the accident was entirely the result of the plaintiffs' own acts. *Foy* v. *London, Brighton and South Coast Railway Company* (18 C. B. (N.S.) 225), distinguished. Per Kelly, C.B., the stopping of the train at the station without any notice to the passengers not to get out was an invitation to them to do so; the descent at that place was dangerous, but not so clearly dangerous that the plaintiffs might not properly encounter the risk; and the company having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on, and the danger of getting out, they were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably.
SINER AND WIFE *v.* THE GREAT WESTERN RAILWAY COMPANY .. 150

3. ——————, *Negligence — Evidence — Presumption — Railway over which several companies possess "running powers."*] A train of the defendants whilst stationary on their railway, was run into by

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another train. The train in fault was the moving and not the stationary train. Several railway companies had "running powers" over the part of the defendants' line on which the collision occurred, and no evidence was given as to whether the moving train belonged to or was under the control of the defendants:—*Held*, that in the absence of evidence to the contrary, it must be presumed that the train which caused the accident belonged to or was under the control of the defendants.
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RECTIFICATION OF REGISTER—*Companies Act*, 1862 (25 & 26 *Vict.* c. 89), s. 35.] A shareholder in a company whose articles of association contained a clause prohibiting the directors from carrying on the business of the company or making calls, until all the shares were taken up, except after a resolution to continue the company, successfully resisted an action for calls, on the ground that the whole of the shares were not taken up, and that no such resolution had been passed. He then applied under s. 35 of the Companies Act, 1862, to have his name removed from the register:—*Held*, that the power of the Court to remove a shareholder's name from the register only existed in the two cases of his name having been improperly entered, and of his having ceased to be a member; and that neither circumstance occurred here. The application was therefore refused.
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ROYAL RESIDENCE—*Privilege—Sheriff—Process—Hampton Court Palace.*] Hampton Court Palace forms part of the royal demesnes of the Crown, and was formerly a royal residence, but has not been personally occupied by the sovereign since 10 Geo. 2. The state apartments are, and have been for many years past, used as a picture gallery; the pictures are the property of the Crown, but the public are admitted to view them gratuitously; the other apartments are occupied partly by officers of the palace, but principally by private persons, by the permission and at the pleasure of the Crown. The palace and grounds are maintained by the Crown, by its own officers and servants; a guard of honour is kept there, and service is performed in the Chapel Royal by a resident chaplain appointed by the Crown. The palace is under the control of a housekeeper appointed by the Crown, who has apartments in the palace. A writ of fi. fa. having been executed in one of the suites of apartments occupied by private persons, and an information of intrusion having been filed against the sheriffs and their officers:—*Held*, per Blackburn, Mellor, and Lush, JJ., affirming the judgment of the Court below (dissentientibus Willes, Keating, and Montague Smith, JJ.), that the palace being so occupied that the sovereign could not as a matter of fact immediately resume personal residence, such occupation was inconsistent with its being a royal palace of residence. *Per Curiam.* The privilege of palace is attached to any place which is in fact a royal residence, and actual personal residence at the time is not necessary to confer the privilege, if there be an intention on the part of the sovereign to retain the power of immediately resuming personal residence at pleasure.
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SALE OF GOODS—*Payment by "approved" Bill—Vendor's Right to have recourse to Purchaser on dishonour of Bill—Duty of Vendor—Notice of dishonour—Purchaser not a party to Bill.*] The plaintiffs sold to the defendants goods to be paid for, according to the contract between the parties, by cash or "approved banker's bills." The defendants paid for them by "approved banker's bill," which was dishonoured on presentment for acceptance. They were not parties to the bill, and received no notice of dishonour. In an action against them at the suit of the plaintiffs for the price of the goods:—*Held*, that the defendants' liability was not more extensive than it would have been if they had indorsed the bill, and that they were therefore discharged, not having received due notice of dishonour.
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SHIP AND SHIPPING—*Transfer of Ship on Voyage—Master—Bill of Lading "free of Freight.*] F. & Co., shipowners at Liverpool, requested the defendants to purchase for them, through the defendants' Calcutta house, a quantity of cotton, to be shipped on board two ships of F. & Co., which were then on their way to Calcutta, consigned to the defendants; and, as the goods were to be shipped on owners' account, they consented to a nominal rate of freight being inserted in the bill of lading. Before the execution of the order, one of the ships, the *Royal Sovereign*, was transferred to the plaintiffs. The defendants, through their Calcutta house, executed the order, and, having no notice of the transfer to the plaintiffs, shipped part of the cotton on board the *Royal Sovereign*, the master, who also had no notice of the transfer, signing bills of lading to the defendants' order "freight for the said goods free on owners' account." Before the arrival of the ship in England F. & Co. stopped payment, and the defendants claimed to stop the goods in transitu. On her arrival the plaintiffs immediately took possession of the ship, and claimed freight:—*Held*, on a case stated, raising the question whether the plaintiffs were entitled as against the defendants to freight, or to a sum equivalent to freight, for the carriage of the goods, that the plaintiffs were not so entitled. Per Kelly, C.B., that the master, until he received notice of the change of ownership, retained the powers which had been conferred upon him by the original owners, so far as to bind the new owners by contracts for the carriage of goods entered into by him pursuant to his original instructions.
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2. ——————, *Negligence—Collision—Compulsory Pilotage—Master and Servant—Port of London—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104)—*General Pilot Act* (6 *Geo.* 4, *c.* 125).] All vessels coming up the Channel to London are required by s. 378 of the Merchant Shipping Act, 1854, to take a pilot on board at Dungeness, and to put him in charge of the ship. From Dungeness to London Bridge is, by s. 370, constituted the Trinity House pilotage district; but no pilot can be licensed to conduct ships both above and below Gravesend; and the pilotage rates are rates from Dungeness to Gravesend, and not to any intermediate place. By s. 59 of 6 Geo. 4, c. 125, vessels being within their own port are exempted from compulsory pilotage. The defendant's vessel coming up the Channel to London, took a pilot on board at Dungeness; before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with the plaintiffs' vessel through the pilot's negligence. The defendants' vessel belonged to the port of London, and if the port extends to Yantlett Creek she was at the time of the collision within her own port; if it only extends to Gravesend, she was not within her own port:—*Held* (per Martin, Bramwell, and Channell, BB.; Kelly, C.B., dissentiente), that, even assuming the vessel to have been within her own port at the time of the collision, yet the pilot having been compulsorily taken on board and put in charge of the ship, and his duty as pilot not having ended, he was not the servant of the defendants, and they were not therefore liable for his negligence. *Lucey* v. *Ingram* (6 M. & W. 302), followed. Per Kelly, C.B., and Channell, B., for pilotage purposes the port of London extends from Staines to Yantlett Creek. Per Martin and Bramwell, BB., it extends only from London Bridge to Gravesend.
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3. SHIP AND SHIPPING—*Mortgage—Freight—Interpleader—Equitable Right—Assignees in Bankruptcy.*] A mortgage of a vessel carries with it the freight, and the mortgagee intervening by taking possession, or by an act equivalent to taking possession, before the freight becomes payable, is entitled as against the mortgagor, or his assignees in bankruptcy, to receive it. The owners of a ship having mortgaged it to the plaintiff, chartered it to S. and D., for a voyage to Brass River, two-thirds of the freight being payable five days after sailing from Liverpool, the remaining one-third on receipt of the captain's advice of delivery at Brass River. The plaintiff demanded the two-thirds freight from the owners, both before and after it was payable, but did not obtain it. After the complete discharge of the vessel at Brass River, but before receipt of the captain's advice of delivery, the plaintiff gave notice of his mortgage to the charterers, and on the return of the vessel to Liverpool took possession of her outside the port. *Held* (Bramwell, B., dissentiente), that although the mortgagee could not sue upon the charterparty, yet he was by virtue of his mortgage entitled as against the owners to claim and to receive the freight; that his right to receive the freight might be perfected by his taking possession, or doing an act equivalent to taking possession, at any time before the freight was payable, although after it had been actually earned; that actual possession being impossible, notice to the mortgagors and to the charterers was an act equivalent to taking possession, and that the plaintiff having done all that was possible to manifest his right, was entitled to be paid the freight. In an action for freight brought by the mortgagee of a ship against charterers under the mortgagors after the mortgage, the charterers interpleaded and paid the freight into Court; and an interpleader issue was directed between the plaintiff and the assignee in bankruptcy of the mortgagors. On this issue a special case was stated, concluding with the question whether the plaintiff was entitled as against the defendant to the sum in Court. *Held* (Bramwell, B., dissentiente), that the Court would in this special case consider the equitable rights of the parties; and that as the plaintiff was equitably entitled to the freight as against the owners, and the defendant, as assignee in bankruptcy of the owners, could only take that to which the owners were equitably as well as legally entitled, the plaintiff was entitled to recover.
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SLANDER—*County Court Judge—Words spoken while sitting as Judge—Malice—Irrelevance.*] Plea, to a declaration for slander, that the defendant was a county court judge, and the words complained of were spoken by him in his capacity as such judge, while sitting in his court, and trying a cause in which the present plaintiff was defendant. Replication, that the said words were spoken falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not bonâ fide in the discharge of the defendant's duty as judge, and were wholly irrelevant in reference to the matter before him:—*Held*, that the replication was bad, and the action not maintainable.
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of a mortgage exceeding 1400*l.* a fixed duty of 1*l.* 15*s.* The 24 & 25 Vict. c. 91, s. 30, enacts that where there are *several deeds* on the transfer of a mortgage from old to new trustees, if one of the deeds be stamped with the duty of 1*l.* 15*s.*, it shall be sufficient that the others are stamped with the duty by law chargeable on a duplicate or counterpart, viz., 5*s.* The 28 & 29 Vict. c. 96, s. 17, after reciting that certain duties were imposed on transfers of mortgages by the 13 & 14 Vict. c. 97, enacts that in lieu thereof there shall be charged and paid on every such transfer for every 100*l.* of the amount or value of the principal money or stock already secured by such mortgage thereby transferred, or fractional part of 100*l.*, the duty of 6*d.* :—*Held*, that provisions of the 24 & 25 Vict. c. 91, s. 30, were not repealed by the general enactment contained in the 28 & 29 Vict. c. 96, s. 17, and therefore that trustees were still entitled to the privileges afforded under that section.

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